Supreme Court of the United States

OCTOBER TERM, ~~1965~~ 1966

No. ~~1093~~ 81

LEE E. A. PARKER, PETITIONER

vs.

CLARENCE T. GLADDEN, WARDEN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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[fol. A]

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

No. 300-660

[File Endorsement Omitted]

LEE E. A. PARKER, PLAINTIFF

vs.

C. T. GLADDEN, Warden of the Oregon State Penitentiary
DEFENDANT

AMENDED PETITION FOR POST CONVICTION HEARING AND RELIEF—Filed July 23, 1964

TO: THE HONORABLE ALFRED T. SULMONETTI, Judge of the above entitled Court:

COMES NOW, the petitioner, and alleges as follows:

I.

That at all times hereinafter mentioned the defendant is the Warden of the Oregon State Penitentiary, Salem, Oregon.

II.

That the petitioner is unlawfully confined and restrained of his liberty by the defendant at the aforesaid Oregon State Penitentiary.

III.

That the aforesaid imprisonment is by virtue of an alleged judgment and sentence entered by the Circuit Court of the State of Oregon for the County of Multnomah on the 19th day of May 1961, in the case of State of Oregon vs Lee Parker, No. C36135; that the aforesaid judgment and sentence purports to sentence the petitioner to the Oregon State Penitentiary for an indeterminate

time, the maximum term of which is the remainder of his natural life; that thereafter petitioner filed a petition for rehearing before the Supreme Court of the State of Oregon, which said petition was denied; that no prior proceedings under the post conviction hearing act have been undertaken by the petitioner herein;

[fol. B] IV.

That the criminal act with which petitioner was charged in the foregoing proceedings was initially that of murder in the first degree; that said charge was filed in the form of an indictment by the Grand Jury of Multnomah County on the 31st day of January 1958, and that the petitioner was arraigned, a plea of not guilty was entered, a trial was had, and the defendant was convicted by the jury of murder in the second degree; that thereafter upon appeal to the Oregon Supreme Court, the judgment was reversed and the cause was remanded on November 30, 1960 to the Circuit Court of Multnomah County for a new trial; that the cause came on for trial before the Honorable Eugene K. Oppenheimer on April 24, 1961 and the Trial Court read the indictment to the jury in the form of second degree murder; that thereafter on the 3rd day of May 1961, the jury returned its verdict of murder in the second degree and sentence was entered as aforesaid on the 19th day of May 1961.

V.

That during the course of the trial as aforesaid between the dates of April 24, 1961, and May 3rd of 1961, the jury acted in such a manner as to amount to misconduct wherein and whereby the petitioner was denied a fair and impartial trial; that during the course of the trial on the dates as aforesaid the bailiffs in charge of the jury were guilty of such misconduct and malfeasance of duty as to deny to the petitioner a fair and imparital trial; that the misconduct of the jury and the bailiffs did, in fact, make it impossible or difficult for the petitioner to have a fair and impartial trial and the verdict rendered by the jury could only have been as a direct and

proximate result of the actions of the jury and bailiffs as aforesaid.

[fol. C]

VI.

Some, but not all, of the acts of the jury as aforesaid are as follows:

1. General belief and statement by members of the jury and discussions thereof during recesses of trial, among members of the jury, with each other, as to the guilt of the petitioner.
2. Sleeping during the presentation of evidence during the trial.
3. Receiving of notes and messages from spectators during the course of the trial.
4. Discussing with non-jury members the case during the course of the trial.

VII.

Some, but not all, of the acts of the bailiffs as aforesaid were as follows:

1. Allowing the door of the jury room to be opened while jurors were recessing during the trial and while witnesses were talking about the case outside the door in hearing range of jurors.
2. Separating the jurors on a number of occasions.
3. Discussing the case directly with the jurors.
4. Passing notes from spectators to jurors.
5. Passing on the guilt of the petitioner to the jurors during trial.
6. Not being in attendance with the jury at all times during the course of the trial and delegating the post to another.

VIII.

That none of the acts of the jury and the bailiffs as aforesaid were a matter of record, and petitioner has been unable until this time to secure evidence thereof wherein [fol. D] and whereby petitioner has been unable to raise the issues as aforesaid until this time and in this proceeding.

IX.

That affidavits of jurors substantiating the allegation herein made are on file herein, marked Exhibits A, B, and C, and by this reference made a part thereof.

X.

That petitioner upon his initial arrest on December 20, 1957, was held ten days incommunicado, and was denied the right to speak to or obtain counsel, and was prevented from being brought before a Court promptly following his arrest to learn the nature of the charges against him.

XI.

That the office of the Multnomah County District Attorney entered into the prosecution of the petitioner with a clear purpose and intention of obtaining a conviction in spite of its knowledge of the innocence of the petitioner and the further knowledge of the false, doubtful, perjured and inadmissible nature of evidence produced by the State against the petitioner; that in wilfulling pursuing this course of "conviction at any price," the State coached, intimated, promised, and threatened witnesses to induce them to testify against the petitioner, and overpaid witnesses for their cooperation with the State in amounts in excess of that necessary to produce them for trial.

XII.

That following the arrest of the petitioner, and while he was confined, the State caused his personal property to be seized and confiscated; that said property was taken through an illegal search and seizure, and property thus wrongfully obtained was introduced in evidence against the petitioner at both his first and second trials; that the taking of his property as aforesaid constituted, among other constitutional violations as set out hereinafter, a [fol. E] taking of petitioner's property without due process of law.

XIII.

That after the Grand Jury indicted the petitioner, and before he had an opportunity to be brought into Court, he was examined and questioned privately by the State without benefit of counsel.

XIV.

That the State knowingly permitted false and heresay testimony to be given to the Grand Jury which indicted petitioner, and that at the Grand Jury hearing on the 24th day of January, 1958, offered unsworn, personal testimony by the Deputy District Attorney presenting the case on behalf of the State, the same being Oscar Howlett.

XV.

That the State's attorney, Oscar Howlett, made false representations of material facts to the Court during the prosecution of petitioner.

XVI.

That the State wilfully and deliberately prevented appearance of petitioner's witnesses at time of trial.

XVII.

That proceedings and conduct were had before the Court, and in the presence of the jury during the trial, which were omitted from the transcript of the first Parker trial on the 19th day of April, 1958, that as a result thereof, the Supreme Court was denied the benefit of knowing the true and full record of the trial, which proceedings and conduct were materially prejudicial to the petitioner.

XVIII.

That Violet Bostwick and other appeared before the Grand Jury on or about the 24th day of January, 1958, [fol. F] that their names do not appear on the indictment, although their testimony was offered on trial by the State.

XIX.

That upon appeal to the Supreme Court of Oregon from the judgment of conviction in the Circuit Court of Multnomah County, said judgment being entered the 24th day of April, 1958, the Appellate Court, pursuant to ORS 138.230, gave judgment in favor of the defendant-appellant, Lee Parker, and pursuant to ORS 138.240, reversed the judgment in the lower Court; that said judgment of reversal did not order a new trial; that pursuant to ORS 138.260, the judgment of the Appellate Court was entered in its Journal, and a certified copy of the entry was remitted to the Clerk of the Circuit Court of Multnomah County; that the Clerk of the Circuit Court of Multnomah County failed to properly enter the same in the Journal of the Circuit Court, which prevented the operation of ORS 139.270 requiring that, upon receipt of certified copy of judgment of Appellate Court, and after entry in the Journal of the Court below, that thereafter said judgment shall be enforced with no further proceedings; that as a result thereof, petitioner was denied his constitutional rights, including his rights of due process, and rights given him by statute to receive the benefit of the judgment of the Supreme Court.

XX.

That upon complying with ORS 138.260 as set out hereinabove, the Supreme Court, pursuant to ORS 138.290, had no further jurisdiction of the Appeal or of the proceedings thereon; that upon receipt of the certified copy of the entry of judgment of the Supreme Court as aforesaid, the Clerk of the Multnomah County Circuit Court allowed the office of the District Attorney to take the mandate sent down by the Supreme Court, unbeknownst to the petitioner and said District Attorney's office, through its [fol. G] prosecuting deputy, Oscar Howlett, made ex-parte arrangements with the Circuit Court, and with the Supreme Court, to change the judgment and mandate of the Supreme Court, wherein and whereby said Judgment was altered to provide that the judgment of the Circuit Court be reversed, and a new trial ordered; that the actions of the office of the District Attorney and the Circuit Court

of Multnomah County in arranging ex-parte for change of the Supreme Court's judgment and mandate was a violation of petitioner's constitutional rights including his rights of due process, and against the statutes of the State of Oregon in that, where the Supreme Court's original judgment freed the petitioner, he was denied this freedom and forced to stand trial a second time.

XXI.

That petitioner was indicted of the crime of first degree murder on the 31st day of January, 1958; that after a trial, he was convicted of second degree murder by the jury, and judgment entered thereon; that the Supreme Court of Oregon reversed said judgment of conviction, that without jurisdiction and in violation of his constitutional rights, the Supreme Court ordered a new trial; that petitioner was tried at the second trial for second degree murder but no new indictment was brought against him; that the Court changed and altered the original indictment and petitioner was tried on said changed and altered indictment for the crime of second degree murder; that jury was never permitted in the second trial, to see the indictment on which petitioner was tried; that the Court was without power or authority to alter or change the indictment as aforesaid, and said actions constituted an unlawful avoidance of the Grand Jury process.

XXII.

That during a jury view at the second Parker trial, the trial Judge rode with the jury, in a vehicle different than [fol. H] that in which petitioner was riding, and said trial Judge had conversation with one or more of the jurors at that time.

XXIII.

That during the course of the second Parker trial, and while the jury was in the box, and the Court in session, the trial Judge left the bench on at least two occasions.

XXIV.

That petitioner was tried in the second trial on an altered indictment as aforesaid charging him with the crime of second degree murder; that he was convicted thereon on the 3rd day of May 1961, of murder in the second degree; that the judgment thereon was never properly made and entered, and there has never been a proper and correct judgment thereon; that petitioner has, as a result thereof, been confined in the Oregon State Penitentiary illegally and unlawfully and in violation of his constitutional rights.

XXV.

That upon the purported judgment entered on the 19th day of May, 1961, petitioner was taken to the Oregon State Penitentiary without a proper order and without being shown a copy of said order in violation of ORS 16.765.

XXVI.

That the Supreme Court of Oregon, in considering the Appeal of the petitioner from his second judgment of conviction in Multnomah County entered the 19th day of May, 1961, affirmed said Circuit Court judgment, and based its decision in part on the assumption that the testimony at said trial established that the deceased victim, Holloway, was enticed into petitioner's car by petitioner in Multnomah County; that said assumption has no foundation in fact, as there was no testimony throughout the trial as evidenced by the transcript thereof, to justify such assumptions; that the result of this error of the [fol. I] Supreme Court is to add testimony to the trial record against which the petitioner is unable to defend, upon which cross-examination cannot be conducted; that as a result thereof, evidence offered for the purpose of convicting petitioner has been given the Court, by the Court itself, without the defendant being present, all to his prejudice and in violation of his constitutional guaranty of due process.

XXVII.

That petitioner, in attempting to gain access to the Court's while incarcerated in the Oregon State Penitentiary, has been denied the right of communication with the Courts, attorneys, witnesses and his own family, wherein and whereby petitioner has been denied right of due process and right to prosecute a legitimate Appeal.

XXVIII.

That the said judgment order of sentence signed by the Circuit Court of the State of Oregon for the County of Multnomah was and is void and invalid as being in violation of Article I, Section 10, 11 and 16 of the Oregon Constitution and in violation of the 5th, 6th, 7th and 14th Amendments of the United States Constitution, and in further violation of the laws of the State of Oregon.

XXIX.

That petiitoner has been unable to or prevented from raising the issues set out hereinabove until this time and in this proceeding.

WHEREFORE, petitioner prays this Court as follows:

1. Ordering the petitioner to be forthwith released from custody of the defendant.
2. That this matter be set down for a hearing for the Court to examine the allegations of the petitioner as aforesaid.
3. Vacating and setting aside the sentence imposed by [fol. J] by the Circuit Court of Multnomah County for the State of Oregon.
4. For such other and further relief as to the Court may seem just and equitable in the premises.

/s/ George P. Haley
GEORGE P. HALEY
Attorney for Petitioner

[fol. 1]

IN THE
CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

No. 300-660

LEE E. A. PARKER, PLAINTIFF

vs.

C. T. GLADDEN, Warden of the Oregon State Penitentiary
DEFENDANT

EXCERPTS FROM TRANSCRIPT OF RECORD

Portland, Oregon,
Commencing Monday, June 22, 1964,
at 9:40 o'clock A.M.

BE IT REMEMBERED That the above-entitled matter came regularly on for hearing before the Honorable Alfred T. Sulmonetti, Judge of Department 8 of the above entitled court, at this time and place, pursuant to Plaintiff's Petition for Post-Conviction Relief.

APPEARANCES

Mr. Lee E. A. Parker, personally, and by Mr. George P. Haley, Attorney at Law.

Messrs. C. L. Marsters, Assistant Attorney General of the State of Oregon, and George E. Juba, Deputy District Attorney for Multnomah County, Oregon, of Attorneys for Defendant.

[fol. 56] NAOMI JANE PARKER was thereupon produced as a witness in behalf of the Plaintiff, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HALEY:

Q Mrs. Parker, you are the wife of Lee Parker, the plaintiff here, are you?
A Yes, I am.
Q And in September or October 1963, were you also his wife?
A Yes, sir.
Q All right. Now, did you sit in during most of his trial, or I don't recall whether you—when did you marry Mr. Parker?
A August 24th.
Q Of '63?
A Sixty-two.
Q Of '62. So you missed the second trial?
A Yes.
Q I see. All right.
Now, did you—you can give us the date of your—did you contact any jurors about this case?
A Yes, I did.
Q And when was that?
A Approximately October.
[fol. 57] Q Of '63?
A Yes, sir.
Q And what was the reason that you did this?
A Urging from my husband.
Q I see. You yourself, did you have any idea of what you were looking for?
A No, I didn't.
MR. HALEY: I have no further questions.

CROSS EXAMINATION

BY MR. MARSTERS:

Q How many did you talk to?
A Three.

Q Was that all?

A I called one other but he said that if I had anything important that was to be brought up he would rather be contacted by an attorney, and that's the last I called him.

Q And who were the three that you contacted?

A Mrs. Inwards, Mrs. Drake and Mrs. Gattman.

THE COURT: Let's have those again. Mrs. Inwards?

A Inwards, Mrs. Drake,—

THE COURT: What was the third one?

A Mrs. Gattman.

THE COURT: Thank you.

MR. MARSTERS: Q How did you get their names? [fol. 58] A I got the jury list from—I can't remember where I got the jury list. I think from Mr. Sundstrom.

Q And did you have any previous knowledge or indication that these three women would give you some information relative to this case?

A No, sir.

Q You just called them by random? Just—

A Yes.

Q Just started down the list?

A Yes.

Q But you only called three. Why didn't you call 12?

A Well, I called the foreman and when I got the answer from him that he would rather talk to an attorney I thought the others would feel the same way, so then I went and got an attorney.

Q Did your attorney call the rest then, or do you know?

A I don't know, sir.

THE COURT: What lawyer did you get?

A Mr. George Haley. That was quite a while afterwards.

THE COURT: All right.

MR. HALEY: About when did you retain me?

A In December. I couldn't give a date.

MR. HALEY: All right.

MR. MARSTERS: Q This was after you talked with these three ladies?

[fol. 59] A Yes.

Q Where was the conversation with each of these ladies? In other words, did you just talk to them over the phone, did you go to their home, or did you meet them someplace?

A I called them on the phone and they came to my house.

Q They came to your house?

A Yes.

Q Did you pay them anything for this affidavit?

A No, sir.

Q Did they go before a Notary Public or anybody to make this affidavit?

A Yes.

Q Were you present when they did?

A Yes.

Q Who did they go before to give the—

A Mr. Haley.

Q I see.

THE COURT: Let me be sure I understood that. You invited these three jurors to your home?

A Yes.

THE COURT: Was Mr. Haley present when you brought them there?

A No.

THE COURT: You just talked with them yourself about the case?

[fol. 60] A That's right.

THE COURT: And then you later brought them to Mr. Haley's office?

A Yes.

THE COURT: Did you take them to his office?

A Yes.

THE COURT: All right.

MR. MARSTERS: Q Were they all three there at the same time?

A Yes.

Q And all three of you, or all four of you, discussed generally what's contained in each affidavit before you took them down to make the affidavit?

A Yes.

Q Now, I believe you testified—if I am wrong just say so—that you were there when these affidavits were made and when they were signed before Mr. Haley, the Notary Public?

A Yes.

Q Well, now, how were they prepared? What was the mechanics of it? Did Mr. Haley write it out and they sign it? Did they talk to him as he wrote it out, or did they write it out first and hand it to him? That's what I am after. How was this taken?

A Well, it was just generally discussed and as they told the things that had happened it was written down.

[fol. 61] Q By Mr. Haley?

A Yes.

Q And I assume it was in typewritten form that they signed?

A Yes, sir.

Q Did Mr. Haley dictate this typewritten statement to a secretary and have her type it out, did he type it out, or how was it typed?

A That was after we had gone that it was typed. I wouldn't know.

Q I see. Was it handwritten, then, by each of these individuals, or handwritten by Mr. Haley only?

A I will have to say by Mr. Haley.

MR. MARSTERS: I think that's all.

REDIRECT EXAMINATION

BY MR. HALEY:

Q Mrs. Parker, to refresh your recollection, perhaps you can refresh mine,—

MR. MARSTERS: Well, your Honor, I am going—

MR. HALEY: Q Do you—

MR. MARSTERS: Just a minute. If the Court please, I have an objection. I object to this refreshing memory business. Now, if he has got questions I have no objection whatsoever, or if he wants to excuse the witness and go [fol. 62] and talk to her that's something different, but I object to this method.

THE COURT: I will sustain the objection.

Do you have any further redirect of this witness?

MR. HALEY: I do, your Honor.

THE COURT: You may proceed.

MR. HALEY: Q Now, mechanically, what you say is that you brought them to my office, you recall—

A (The witness nodded.)

Q —and we discussed the matter, didn't we?

A Yes.

Q And the State's attorney asked you about the notarizing their signatures. Now, I wonder of you would consider what that consists of and whether or not—I think you told him that you observed them notarize—their signatures being notarized.

A What—I am confused.

Q Well, I believe that you told Mr. Marsters here that you observed the three people having their signatures notarized.

A I think I said that but they weren't.

THE COURT: But they what?

A They weren't notarized in Mr. Haley's office.

MR. HALEY: Q Well, to your knowledge, you mean?

A No. I mean I don't know about that.

[fol. 63] THE COURT: Let me ask you, Mrs. Parker. Do you know what notarization means?

A Yes, that is where—

THE COURT: In other words, where a person is asked to affirm a statement by affixing his signature in the presence of a Notary Public, who then acknowledges and puts a seal on it.

A Yes, I know.

THE COURT: Did you see that done in your presence?

A No.

THE COURT: Do you know if these statements were notarized, from these three jurors?

A I didn't see it done, I know that.

THE COURT: All right.

MR. HALEY: I have no further questions.

THE COURT: Anything further, Mr. Marsters?

MR. MARSTERS: No, I think that is all.

* * * *

[fol. 64] LEE EDWIN ALLAN PARKER, the Plaintiff, called as a witness in his own behalf, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HALEY:

Q Mr. Parker, you are the plaintiff here, are you?

A Yes, sir, I am.

Q And following the denial of a rehearing for your appeal in September or October of 1963, were you aware of any of the matters set out in these affidavits in this case that we are trying today?

A No, I was shooting in the dark, only, the one particular point about the jury door being open.

Q You knew about that?

A Yes.

Q What caused you to ask your wife to call the jurors?

A The jury was out 26 hours and five minutes, I think, and the big part of that time I had my mother and a friend of mine in the courtroom and observing. They couldn't see anything that I can recall, except that there was a lot of loud talking and crying and going on, so they said. Of course, I was in jail upstairs at that time.

Q But any of the matters that are put in here, you were unaware of during the trial, is that right?

A I was unaware, yes.

[fol. 65] Q And your first knowledge of it came when your wife told you that she had the affidavits?

A Yes. I might clarify that to the point that the Sheriff of Multnomah County permitted my wife and my mother to visit me in jail in October and bring a tape recorder, and I think my wife has that tape now, and I run down a few questions to ask, at that time, Mr. Carskadon, Junior, who was Mr.—Judge Oppenheimer's court clerk, and everyone I could think of.

Q You had asked her to do a number of things, among which was to call the jurors?

A Yes.

MR. HALEY: I have no further questions.
MR. MARSTERS: I have none.

* * * *

[fol. 66]

* * * *

GENEVIEVE S. INWARDS was thereupon produced as a witness in behalf of the Plaintiff, and, being first duly sworn, was examined and testified as follows:

* * * *

[fol. 67]

* * * *

DIRECT EXAMINATION

BY MR. HALEY:

Q Mrs. Inwards, where do you live?
A 10333 East Burnside.
Q And were you living there at the time you were a juror in this case in April 1961?
A Yes, I was.
Q Are you married?
A Yes, I am.
Q You were a juror, were you not, in this case, the State of Oregon versus Lee A. Parker?
A Yes.
[fol. 68] Q And you served during the whole time of the case?
A I did.
Q And that included the deliberations, did it not?
A That's right.
Q You have made an affidavit concerning a conversation you overheard between Mr. James Cormack, one of the bailiffs, and Mrs. Gattman. Will you briefly tell the Court what you heard?
A Well, just whatever was read in the affidavit. As we were out walking one time I remember hearing them say that—to the effect that he was guilty. I just can't remember the exact words, is all.
MR. MARSTERS: Well, your Honor, I don't want to object and I don't want to interrupt, but it's awfully hard for me to understand what she is saying and she

said something about hearing "them" and I don't know who she is talking about.

THE COURT: Well, I didn't quite understand her either.

THE WITNESS: The ones that he asked—

MR. MARSTERS: Well, who is "he"?

A Mr. Haley, his questioning.

MR. HALEY: In other words, you heard a—you yourself observed Mrs. Gattman and Mr. Cormack talking, did you, on at least one occasion?

A Well, not especially observed. I was just near.

Q You heard?

[fol. 69] A Yes.

Q And you have stated in your affidavit that Mr. Cormack said, in response to a query of Mrs. Gattman's, "Don't worry about it. He is guilty," is that correct?

A To that effect.

Q Yes. And on another occasion you have alleged when you were walking from the courthouse to lunch you were walking with Mrs. Drake, behind the bailiff, Mr. Cormack, and another man juror, and you heard them discussing the case; is that correct?

A Yes.

Q And you have alleged that Mr. Cormack said, "If there is anything wrong the Supreme Court"—

THE COURT: Just a minute. I think this is leading and suggestive. Let's let the witness—

MR. HALEY: All right, your Honor.

THE COURT: What remark did you hear Mr. Cormack make at this time?

A Well, I believe it had to do with the Supreme Court, something or other. I can't remember which was said where but I do remember hearing remarks to that effect.

THE COURT: Remarks to what effect?

A About the Supreme Court taking care of it, or something, and then, as I stated before, that he was guilty.

THE COURT: Let's cut the microphone.

[fol. 70] THE WITNESS: Am I too close?

THE COURT: You have a soft voice and it is magnifying some imperfections. Now, I want to understand you accurately here.

(Thereupon, a 2-page typewritten affidavit signed "Genevieve Inwards" and bearing the signature of "Helen L. Haley," Notary Public, was marked for identification PLAINTIFF'S EXHIBIT 4.)

THE COURT: You are telling the Court that you overheard conversation between Mr. Cormack and Mrs. Gattman, one of the jurors?

A Yes.

THE COURT: And this was during the course of the trial?

A (The witness nodded.)

THE COURT: First let's state, then, about what period in the term of the trial was this conversation had?

A I just couldn't say.

THE COURT: You couldn't say. Had the State rested their case yet? That is, had the State put in all their evidence when you heard this conversation?

A I couldn't say, your Honor.

THE COURT: Can you tell us where you were and where Mr. Cormack was and where Mrs. Gattman was [fol. 71] when you overheard this conversation?

A Well, I believe once in the jury room.

THE COURT: Once in the jurors' room?

A There was something to that effect, and once I remember walking, when we were out for a walk, the jurors were.

THE COURT: Now, when you were out for a walk?

A Yes, the bailiffs took us for walks. I think this was on the weekend when we were locked up.

THE COURT: And you were walking down the street, the entire jury?

A Yes.

THE COURT: And you tell me exactly, now, what you heard Mr. Cormack say to Mrs. Gattman, again.

A Well, I just can't remember which was where, I mean which statement was out walking and what was in the jury room.

THE COURT: Well, let's take the statement you heard walking, first.

A Well, I can't remember. Like I said, this is all so—it's so hard for me to remember who said what,

when and where, but I do remember these statements being made.

THE COURT: Now, I want you to tell us over again what the statements were which you heard Mr. Cormack make to Mrs. Gattman.

A Oh, "Don't worry. The man is guilty," something [fol. 72] to that effect. I can't remember the exact words.

THE COURT: And what was the other conversation you heard?

A Something about the Supreme Court taking care of something.

THE COURT: Something about the Supreme Court taking care of something?

A Yes. At that time I knew nothing whatever about court procedure and so on.

THE COURT: But that's the best that you can recall this particular conversation?

A Yes. —May I say something, your Honor?

THE COURT: Yes, you may.

A Following this case it—I had rather a bad time with my own conscience, shall I say, and I tried so hard to forget it all, in fact, my husband insisted I do, that I guess I did such a good job of forgetting it all that it's very hard to remember, everything is so vague.

THE COURT: All right.

Anything further?

MR. HALEY: May counsel approach the witness?

THE COURT: You may.

MR. HALEY: Q Mrs. Inwards, I hand you Plaintiff's Exhibit No. 4 and ask if you can identify this?

A Yes.

[fol. 73] Q And this is your signature thereon, is it?

A That's right.

Q And would you tell the Court the circumstances—this is an affidavit that you made, isn't it?

A Yes.

Q Would you tell the Court the circumstances under which you made that affidavit?

A From the very beginning?

Q Yes, I think so.

A Okay.

Well, sometime in October Lee Parker's wife called, and since I was the No. 1 juror on the case I was the first one she called, and she said that she had been allowed to make a—or have a recording made—her husband make a recording before he left Rocky Butte, I believe it was, and she wondered if I would be interested at all in listening to this recording, and I said, "Well, yes, I would listen to it," and I just can't remember what else she might have asked me. I do remember that she sounded quite frightened, as I feel right now, actually, but we did talk for some time and she did thank me for being kind and listening to her, and then she wondered who else might be willing to listen, so I suggested Mrs. Gattman right away. I knew that she would be interested and, well, I think really she did ask who were the ones who had held out the longest against the second [fol. 74] degree murder charge.

THE COURT: And you gave her those names?

A Yes.

THE COURT: And the three were which ones?

A Well, there was Mrs. Drake and our foreman, I do believe, of the jury. I can't remember his name at the moment. I am sorry.

THE COURT: All right. Any others?

A Well, Mrs. Gattman, of course, was an alternate juror so she wasn't in on deliberation so I did't—but I knew that she would be sympathetic to listening to what he might have to say.

THE COURT: So you gave her the two names, Mrs. Drake and Mrs. Gattman?

A Yes.

THE COURT: That is, you gave Mrs. Parker those two names?

A Yes.

THE COURT: Now, anything further.

A Well, I just can't remember time, but she said she would contact these. Actually I am quite sure I contacted Mrs. Gattman. I don't know if I did before Mrs. Parker did or not. I just can't remember, but I told her that she would like to have someone listen to these recordings that her husband had made, questions he had asked she [fol. 75] would like to have the jurors answer.

THE COURT: What was the substance of the recording?

A Well, whatever is listed in the affidavit. It was to that effect. Actually, there were a great many questions, I believe, that I just can't remember right now.

THE COURT: Was there anything criticizing the jury as a whole in this statement by Mr. Parker?

A I don't believe so. I can't remember so.

THE COURT: All right.

MR. HALEY: Q Well, then you got a phone call from me, I believe?

A Yes, some time later. I believe that was after we had been to Mrs. Parker's house.

Q Sometime in December, isn't that a fact?

A Yes, uh-huh.

Q And what did you do thereafter? In other words, now tell how you came to write this affidavit.

A Oh. You don't care to hear how we went to the home and listened to the recording or anything?

Q Now, I am mainly interested in identifying the affidavit.

A Yes, you had called and you wondered if we would come down and discuss the points of this.

Q And you did come down?

A Yes, all three of us.

Q And at that time did you sign the affidavit?

[fol. 76] A Not—no.

Q That's right. And when did you sign the affidavit?

A Well, it was sometime later and, like I said, I just can't remember but I remember when we were discussing this case you were talking into something, whatever that was, I don't know.

Q Into my recording machine?

A Yes, I suppose.

Q And you came down to the office sometime after that, didn't you?

A Yes.

Q And do you recall reading the affidavit?

A Yes.

Q I wasn't there, was I?

A No, you weren't.

Q And on this exhibit, Plaintiff's Exhibit 4, there is some scratched-out marks. What was the reason for that?
A Well, I didn't recall saying that, exactly.
Q And so you corrected the copy and initialed it?
A Uh-huh.
Q And then my secretary notarized it?
A Right.

MR. HALEY: We would offer this in evidence, your Honor.

MR. MARSTERS: No objection, your Honor.

THE COURT: If there is no objection the exhibit will [fol. 77] be received.

MR. MARSTERS: No, your Honor, I assume it is the same one that is in the original.

THE COURT: It is an original. The one in the file is a photocopy.

MR. MARSTERS: No objection.

THE COURT: Very well, the exhibit will be received.

(The 2-page typewritten affidavit, so offered, having been previously marked for identification, was thereupon further marked as admitted in evidence as PLAINTIFF'S EXHIBIT 4.)

MR. HALEY: Q Then, Mrs. Inwards,—

And, if the Court please, I wonder if she might refresh her recollection with that affidavit?

Now, would you tell the Court the circumstances surrounding the allegation you have in there about the notes being passed?

A Well, as I did tell you, I—as I remember, down here it says I had observed on one occasion when a female spectator—now, actually I should have looked this over a little more closely, I guess, because I really didn't see the female spectator give the note to Mr. Cormack, but I remember him coming into the jury room and delivering [fol. 78] a note or a card, or whatever it was.
Q All right. And who did he deliver it to?
A Pardon?
Q Who did he deliver it to?
A Mr. George Kalabarash.
Q Kolibaba, I believe it is.

THE COURT: Now, let's be sure we understand you there. You didn't see any female spectator hand a note to Mr. Cormack, the bailiff?

A I didn't. I saw him bring it in to the jury room.

THE COURT: You were in the jury room?

A We were in the jury room.

THE COURT: And Mr. Cormack came in and gave Mr. Kolibaba a note?

A Yes.

THE COURT: Where did this get into your affidavit here, the statement that you saw a female spectator hand him a note?

A That's what I said, I should have read it a little more closely, your Honor. I am sorry. But I did cross out what was following.

THE COURT: All right.

MR. HALEY: Q Well, can you tell us, the Court has asked why this would be in here and you didn't scratch it out. Can you tell the manner in which we arrived at the facts concerning which all of these affidavits—Do you [fol. 79] remember sitting around in my office?

A Yes.

Q Tell the Court how we arrived at these facts.

A Well, we were all discussing—you were asking questions and we were all discussing and answering and so forth. Really I suppose you had asked us all in general, perhaps, a question and if we didn't really deny it I suppose it was taken as a fact that we agreed. I did remember the note being brought in, but actually I don't remember this female spectator. Actually I didn't see it done, but I do know that it was. We later established it was his wife.

Q All right. Now can you tell us about—you have on the second page of your affidavit some matters about taking walks with the jurors. Can you tell us about that?

A Well, we were supposed to stay together. I know that the bailiffs had told us this. And by the way, our lady bailiff was very concerned about this and did an excellent job, I think, of keeping us together, sticking strictly to the rules, actually to Mrs. Gattman's discomfort at one time because she had—I think this was on a

Sunday, I believe, and she had just washed her hair and her hair is long and very heavy, and it wasn't dry, of course, and she wasn't—she isn't too well and she wasn't too well at the time and she really didn't want to go for the walk, but so many of them did want to go that our [fol. 80] lady bailiff said that it was necessary for all of them to go.

THE COURT: Most of the women just wanted to take a walk, is that correct?

A Yes.

THE COURT: All right.

MR. HALEY: Q But on that occasion somebody did, in fact, stay behind, didn't they?

A Yes, they did. I didn't know it at the time, but it was established that they did.

Q And on other occasions, as you have set out here in your affidavit, the jury was taking a walk, did some of the men stay behind? Or did—what happened in that regard? You have it in your affidavit there. Tell the Court about that.

A Do you mean about four of the men jurors declined to go—

Q Yes.

A —and stayed at the hotel?

Q Yes.

A As I said, I didn't actually know it at the time, although I guess I knew we weren't all—all of the jurors weren't together.

Q You didn't think it was significant at the time?

A Well, I really wasn't thinking. I thought it was their business. It wasn't my business to see to it.

[fol. 81] Q Now, can you tell us about this door situation out in the hall?

THE COURT: Before you go into that, when you say "Mr. Miller stayed behind" do you mean he went along on the walk and just stayed behind?

A No.

THE COURT: He stayed in the hotel room?

A Yes. Mrs. Gattman said it was him, and I didn't know,—this was one of the times that I just actually should have said I didn't really know who it was because I didn't know.

THE COURT: Can you tell the Court now for a certainty that you personally know that a male juror did not accompany you on this walking trip?

A That "a male juror"?

THE COURT: Yes.

A Yes.

THE COURT: In other words, that there were 13 of you going around instead of 14?

A Well, there weren't that many because there were more that stayed behind, I am sure on this. I think this is the only walk we took. I can't remember.

THE COURT: How many of them do you think remained in the hotel room?

A Well, it states here four, and I didn't—I didn't [fol. 82] know that many for sure, myself.

THE COURT: Didn't you read this before you signed it?

A Yes, I did. I am sorry. I should have changed a lot more of it, I guess, but while we were—

THE COURT: Well, we want to give you a chance now to change any part that you want to because you are under oath now, Mrs. Inwards.

A Yes, I know. That's what I am scared of.

THE COURT: I don't want to emotionally disturb you, but everything you say here is important.

A Well, I know some stayed behind but how many? I thought at the time perhaps one bailiff was staying with them. Like I said, this wasn't my business especially, but I know they are supposed to be attended at all times. That I know.

THE COURT: But can you tell us that an attendant was present with the jurors who did not accompany you on this walk?

A That I do not know. I do not know.

THE COURT: But you are saying to the Court that there were some jurors who did not accompany you on this particular walk?

A That's right.

THE COURT: Did this happen more than one time?

A No, I am quite sure we just took this one walk.

THE COURT: And you do not know of your own

[fol. 83] personal knowledge whether a bailiff remained behind to stay with the jurors who did not take the walk?

A Well, I didn't know for sure but it seems as though all of the bailiffs accompanied us. I am just not sure on that. It just seems as though they did.

THE COURT: All right.

MR. HALEY: Q Moving on, to this door situation, would you tell us what you remember of this door being open and what happened and what you saw and heard and observed?

A Well, actually it wasn't in July, really, that we had this trial. It was in the first part of May, but it was warm and really I didn't know anything about the door being open until all of a sudden I heard quite a commotion and I looked around and saw the door being closed, and that's all I remember specifically about it.

Q Well, you stated in your affidavit that you remembered voices in the hall, but you don't remember anything specifically that was said?

A Say like you hear people talking vaguely, but I didn't remember anything specific.

Q You stated there was quite a fuss about the door being open. How did this come about?

A Well, I think our lady bailiff was trying so hard to see that everything was done correctly, and I think she became upset over it.

[fol. 84] Q Now, you have stated in your affidavit that there was some discussion in the jury room, particularly among the men. Will you tell us generally about this situation?

A Well, really I don't know, perhaps I am unusual person, like I have told you, and perhaps others, as I told Judge Oppenheimer after the trial, I had come to see him, even. I was having a rather difficult time living with my conscience. I—it seems that the general atmosphere during deliberations was charged, that I always felt that a defendant was considered innocent until proven guilty, and actually it seemed to me that at times—I wouldn't say at all times, but at times it seemed to be just the opposite, the general atmosphere of feeling or

whatever. It seemed—they seemed to be trying to find reasons to prove he was innocent rather than to prove he was guilty. That was my general impression.

THE COURT: Now, who was trying to do this?

A Well, towards the last I—several of the jurors were quite put out with me for holding out so long and wondered what ever I would need or what they could say to get me to realize that I should put in a different vote.

THE COURT: This was during the deliberations, when the case had been submitted to you?

A Yes.

THE COURT: And you retired for the purpose of reaching a verdict?

[fol. 85] A Yes.

THE COURT: What was this discussion between you and the jurors?

A How do you mean, your Honor?

THE COURT: Well, let's put it another way. Was every juror given an opportunity to express his views with respect to the innocence or guilt of the defendant?

A Well, I guess really we didn't do too awfully—well, we did discuss, yes. I seem to always be defending someone until I know for sure they are guilty. That seems to be my—my husband says it is a fault—I carry it to a fault. I could always seem to be able to put myself in the other fellow's place.

MR. HALEY: Q Mrs. —

THE COURT: But the point I want to get, Mrs. Inwards, is this. Was every juror given an opportunity to express his view—

A Oh, yes.

THE COURT: —with respect to the guilt or innocence of the defendant during the deliberation?

A Yes, we were all discussing.

THE COURT: And no one was shut off, or no one was pressurized in any way?

A Well, later I was.

THE COURT: All right.

[fol. 86] A I guess they felt I was the weaker one of the three that seemed to be holding out.

THE COURT: Anything else?

MR. HALEY: Q But prior to the deliberations, when you were in the jury room, what was the general attitude?

A Well, it seemed to be—well, really we weren't supposed to be discussing things then but we would try as we went to the jury room, to sort of relax and just drop everything and sort of let off steam.

Q But was there discussion prior to the deliberations, in the jury room, about the case?

A I couldn't say about anything definite being said.

Q But there was conversation about the case?

A Well, it seems that there was here and there, yes.

Q Yes; and what was the general attitude and feeling, particularly among the men, prior to the deliberations on the case?

A Prior—

MR. MARSTERS: Just a minute. I object to that question.

THE COURT: I will sustain the objection. That is vague.

MR. HALEY: Q Well, in your affidavit you state there was a general feeling by most of the men that the defendant was guilty while the trial was still in progress. Is that a true statement?

[fol. 87] A Yes, I think things had been mentioned to give that general idea.

Q All right.

THE COURT: Well, you just got through telling the Court there was no discussion.

A Well, that's right. If something was said someone would shush them. In fact, I let things slip and I had different ones stop me at different times. Actually I wasn't too aware of the proper procedure at the time. Perhaps there were others as well.

THE COURT: But you were advised by the Court that you shouldn't discuss the case during the trial, is that correct?

A Yes.

THE COURT: And are you telling the Court that there was or was not discussion?

A Really I couldn't say. I don't remember whether it was exactly before deliberations. It's—it is so—all so vague as to time.

THE COURT: All right.

MR. HALEY: Q Well, now, returning to two points, however, Mrs. Inwards, you are sure, are you, that this statement you have in your affidavit here, that you heard Mr. Cormack say to Mrs. Gattman, "Don't worry about it, he is guilty," are you sure you heard it?

A I remember hearing words to that effect, yes.

[fol. 88] Q Close to those words, is that correct?

A Yes.

Q And you also heard him on another occasion say to another juror, in the presence of Mrs. Drake, "If there is anything wrong the Supreme Court will correct it"?

A Yes.

Q You definitely remember this?

A Yes.

MR. HALEY: All right. I have no further questions.

* * * *

[fol. 93] CROSS EXAMINATION

BY MR. MARSTERS:

Q Mrs. Inwards, this trial of Mr. Parker in which you were a juror happened several years ago?

A Three years.

Q And as I understood your testimony this morning, most of what went on relative to what happened in or out of the jury room is a little bit vague at this time to you?

A Rather.

Q Pardon?

A Rather, yes.

Q And at this time you are just not too sure as to when and where or exactly what was said?

A Well, I think actually even if someone weren't in my condition, which I think I explained to the Judge, even that lapse of time, things wouldn't be exactly clear.

Q I am sure it wouldn't be with me either, but that is the fact, is it not?

A Yes.

Q Now, you mentioned that Mrs. Parker contacted you.

[fol. 94] A Yes.

Q And that you, either on your own or at her request, I am not sure, contacted a Mrs. Drake and a Mrs. Gattman?

A Well, I am just not sure if I called Mrs. Drake or not.

Q I see.

A I am quite sure I talked to Mrs. Gattman.

Q And Mrs. Gattman was an alternate juror?

A That's right.

Q And Mrs. Gattman did not, of course, sit in on any of the deliberations of the jury?

A That's right.

Q And you talked with Mrs. Gattman because you thought she would be sympathetic?

A I knew she would be sympathetic.

Q And had you discussed this case with Mrs. Gattman subsequent to the trial, prior to the time Mrs. Parker called you?

A Well, I guess so; in fact, the day the trial was over I know she stopped in with some things she had left at the courthouse. She had had a call that her daughter was in the hospital, or something, and she had left some of her things at the courthouse, and I know that she was —shall I say kind of put out with me for the kind of verdict we brought in.

Q She kind of reprimanded you?

[fol. 95] A Yes, lovingly.

Q Not in any sense of ill will but just kind of a friendly discussion?

A Yes.

Q Now, as I understand it, you voted "Guilty" reluctantly?

A Quite, uh-huh. Actually—may I say something?

Q Yes, you may.

A I have told Mr. Haley this and I told Judge Oppenheimer this following the trial, that I actually can't see any reason—

MR. HALEY: Excuse me just a moment.

If the Court please, I do feel that that which she is testifying to and the question to which she is responding has to do with a mental attitude arrived at as a result

of things that happened, and I believe that the cases are replete on this, that this can not be done; a juror—

THE COURT: What is your specific objection to this question?

MR. HALEY: My specific objection is to the fact that what she is doing is impeaching her own verdict. In other words, she is explaining the effect of these things on her, which I don't think is correct. In other words, she can testify as to what actually happened but not the effect that it received in her mind.

[fol. 96] THE COURT: Do you join in this objection, Mr. Parker?

MR. PARKER: Yes, I do, your Honor.

THE COURT: I would be inclined to sustain this objection.

MR. MARSTERS: Very well, your Honor.

Q Now, were you ever contacted in any way or manner or degree by Mr. Parker himself?

A Yes, I received a letter.

Q And when did you receive a letter?

A Well, that's something I was trying to remember but I just do not remember when this was.

Q Did you receive the letter, are you sure, after the trial?

A Oh, certainly. Quite certain.

Q And prior to the time you made this affidavit?

A Oh, yes.

Q Can you give the Court any idea as to how long prior to the time you gave your affidavit you might have received the letter?

A Quite some time.

Q Now, I will ask you to state and tell the Court, please, whether or not you responded by answering that letter to Mr. Parker?

A I did not.

Q Do you have the letter with you?

[fol. 97] A No, I haven't.

Q Did you keep it?

A I think I did but I actually do not know just where it is.

Q If you saw a copy of the letter, or a similar letter, would you be able to recognize whether or not it was the same contents?

A Possibly.

MR. MARSTERS: May I have the envelope marked and the letter marked?

(Thereupon, a 2-page typewritten letter dated September 7, 1961, signed "Lee Parker" and bearing the handwritten name "Mr. George V. Kolibaba" in the saluation, together with envelope postmarked Portland, Oregon, September 11, 1961, addressed to Mr. George V. Kolibaba, 5616 S. E. Raymond Street, Portland, Oregon, was marked for identification DEFENDANT'S EXHIBIT 5.)

MR. MARSTERS: May I approach the witness, your Honor?

THE COURT: You may.

MR. MARSTERS: I hand you State's Exhibit 5 for identification. Although it's not addressed to you, is that [fol. 98] a similar letter to that which you received and have testified to?

A (After reading) Yes, I believe it was similar.

Q As I understand it, you did not respond to Mr. Parker's letter?

A I didn't.

Q And the next thing that happened is you were contacted by Mrs. Parker?

A Quite some time later.

Q More than a year?

A Pardon?

Q More than a year?

A I believe so, because—trying to remember time, I judge this because I remember taking the letter to our pastor and he had just come at that time, and he has been with us now for three years this summer, so it must have been somewhere around that fall, or something.

Q Now, Mrs. Inwards, I understood you to testify that you, Mrs. Gattman and Mrs. Drake went to the home of Mrs. Parker, where you heard a tap recording of a statement made on the tape recorder by Mr. Parker?

A Yes.

Q And that was played to you?
A Uh-huh, yes, it was.
Q And can you tell the Court, please, approximately [fol. 99] how long it took to hear the tape recording?
A Well, it was a little lengthy, I remember. There were several questions, several points to consider. I just couldn't say how long. I didn't time it or anything.
Q Now, this, of course, was all prior to the time you made the affidavit?
A Yes.
Q Can you give the Court, please,—can you tell the Court anything about what you heard on the tape?
A Well, there were questions similar to what Mr. Haley asked us later.
Q Well, name one.
A Oh, this door being open, for instance, and, oh, the walks, whether we were all kept together, I am quite sure,—I—just things of that nature, the things that have been mentioned in the affidavits, whether we were all together or not.
Q In other words, Mr. Parker was asking you, or anyone who was listening, whether or not these points that you have stated that you observed in your affidavit, if you observed them, asking you that question?
MR. HALEY: May I object to that? Counsel is stating a question assuming facts not in evidence. She didn't answer the question that way. She answered as to the tape, said—asked, "whether or not we had been to- [fol. 100] gether, and things like that."
THE COURT: Well, this is cross-examination, Mr. Haley, and I am going to overrule your objection.
MR. HALEY: Well, for the record let me say this, that I do object to any further testimony regarding what she heard on the tape, because as to her this could be only hearsay and asking information from the tape, she didn't know whether that was Mr. Parker or anybody else.
THE COURT: I will give you an opportunity to redirect this witness if you care to. This is cross-examination and the Court is ruling this is a proper line of inquiry.
You may continue, Mr. Marsters.
THE WITNESS: Repeat the question, please.

MR. MARSTERS: Q Mr. Parker, as I understood you, he was asking you or whoever was listening to this on the tape to consider these points to which you have signed an affidavit that you actually saw or heard?

A I guess so.

MR. HALEY: May I object to that? That isn't what she said.

MR. MARSTERS: She has now.

THE COURT: Mr. Haley, I am ruling this is a proper line of inquiry and I will give you an opportunity to redirect the witness with respect to these matters, if you care to go into it.

[fol. 101] MR. MARSTERS: Q Now, after the tape recording was played did you ladies, including Mrs. Parker, Mrs. Drake and Mrs. Gattman, sit around and discuss this between yourselves?

A Oh, I actually don't think we discussed too much of the—of these points. We were more interested in personal life.

THE COURT: More interested in what?

A Personal lives,—I mean we were discussing—we—just the three of us just had just gotten together and we were just talking over old times, and getting to know Mrs. Parker, who seems to be a very fine person. I think Mr. Parker is fortunate.

MR. MARSTERS: Q Now, you did not, or you did discuss the points in your affidavit after the tape recording?

A Oh, yes, I think we might have because, like I say, I was so vague on all this, and Mrs. Gattman and Mrs. Drake were more specific and they brought up different points that I couldn't—if they would bring them up then I could remember vaguely.

Q Well, that's what I was getting at, Mrs. Inwards. To you it was vague, but after hearing the tape recorder and after the discussion, then you feel that you did remember some of this?

A Some, yes.

[fol. 102] Q Now, how long was it after you had heard the tape recording and had this discussion with these other three ladies that you went to Mr. Haley's and signed this affidavit, or made out this affidavit?

A Well, I think it was in December before Mr. Haley got in touch with me.

Q And this was when?

A October—well, it was the latter part of October, or somewhere in October that Mrs. Parker first called, and then it was shortly after that that we went to her home.

Q Now, when you went to Mr. Haley's office, then the three other ladies, Mrs. Gattman, Mrs. Drake, Mrs. Parker and yourself were all present?

A Yes.

Q And in the presence of Mr. Haley, then he would ask questions and all of you would more or less answer and give him the information that would pertain to the question asked?

A Yes.

Q Is that what I understood?

A Well, he would ask—in general, yes. At this point I just really don't remember anything too specific, but as things were being discussed Mrs. Gattman and Mrs. Drake did remember more specifically than I could.

Q Well, did you actually remember anything about what you have signed in your affidavit?

[fol. 103] A Yes.

Q Well, name one.

A Well, especially this door being open. That I don't remember, but I do remember it being closed. Like I stated, I didn't really notice it until the noise of having it closed and then I remembered that I had just heard voices and so forth, but not anything definite—nothing definite.

Q Now, this was during the course of the trial?

A Yes.

Q Now, did that make any special impression on your mind?

A Well, certainly when they closed it and it seemed to be a matter of quite—importance, then it did—then I noticed it.

Q All right. Now, will you please tell the Court, Mrs. Inwards, whether or not that incident affected your verdict in any way, form or manner?

A (Inaudible)

MR. HALEY: I object to that, your Honor. That is the same basis that I made the original—

THE COURT: I think the witness has already answered the question.

MR. HALEY: Did you get my objection before the answer?

THE COURT: She has already answered it and I wanted to be sure I heard it and then I got your objection.

A It didn't affect my decision.

[fol. 104] THE COURT: Now, I want you to answer it loud enough so these boys can hear it.

A I said it didn't affect my decision at all.

THE COURT: Now, what is your objection, Mr. Haley?

MR. HALEY: My objection, your Honor, again is it goes to the impeaching of her verdict and is not admissible.

THE COURT: Well, no one is trying to impeach this verdict or this witness's decision or any of these decisions.

MR. HALEY: Yes, your Honor, it does if you go to questioning whether something had an effect on her or whether it didn't, you are then showing whether or not these things did—this is showing how she arrived at the verdict she did, and this is the kind of a thing you can't go into.

THE COURT: Well, I want the record to show that the question was asked and the answer given before the objection.

Now I am listening to your objection and you are asking me to do what, Mr. Haley?

MR. HALEY: I am asking to strike her answer, if it was made, on the grounds—

THE COURT: Well, is there any question in your mind that it was made?

MR. HALEY: Well, I didn't hear it.

THE COURT: Well, the Court did and the reporter didn't get it down because it was so low, and I asked her to repeat it.

[fol. 105] MR. HALEY: Well, the reason I didn't, I was rising up to object, but I am asking that it be

stricken because it is immaterial and the question does, in effect, do that very thing, examine into how a juror arrived at a verdict in their minds.

THE COURT: But the question was whether or not these statements which she has made in any way affected her verdict.

MR. HALEY: Uh-huh, and I think that's an improper question.

THE COURT: And her answer was, "No."

Mr. Marsters, what do you think about this objection?

MR. MARSTERS: Your Honor, I think that's the very point of this lawsuit. He is alleging misconduct on the part of certain jurors in this particular case, claiming that as a result of that misconduct he didn't have a fair trial. I think the Supreme Court of Oregon has passed upon this point and that it is necessary to determine whether or not, unless it's so—whether or not it affected their verdict, or the making of their verdict, not how they voted; that isn't what I am after, but whether or not it had any influence in the making of their verdict one way or the other, and unless the conduct is so flagrant on its face that this Court can say as a matter of [fol. 106] law that it would have affected the verdict.

THE COURT: Do you think it is improper, such as the statement which Mr. Cormack was supposed to have made, "Don't worry, he is guilty"?

MR. MARSTERS: No, your Honor.

THE COURT: You don't think that statement itself presumes, or if made would be prejudicial in and of itself?

MR. MARSTERS: Well, I think you have to go further than that statement to find out for sure if she knows what he was actually talking about.

THE COURT: Well, let me ask, do you have any authority for your objection?

MR. HALEY: I do, your Honor.

MR. MARSTERS: Yes, I think the case of *Carson* vs. *Brauer*, 76 Advance Sheet, page 751, answers these questions.

THE COURT: That isn't in volume yet—yes, it is.

MR. HALEY: Carson vs. Brauer, your Honor, I have it here. I just have the Advance Sheets on it to 76 Ad-

vance Sheets, No. 15, at page 751. Carson vs. Brauer is one we would cite also for the same authority.

THE COURT: Let's take a look at it.

MR. HALEY: I might point out to the Court at this time that I am not, for myself, I am not going into the question of whether or not the statements made or misconduct is a presumption. My direct objection at the [fol. 107] present time is that Carson vs. Brauer holds, as does State vs. Gardner, and a whole line of cases, that you cannot impeach a jury's verdict by affidavits which tend to show how they arrived at it, but you can have affidavits showing what happened.

THE COURT: Well, then, when you do that, though, don't you think that the—there is the right to interrogate the juror as to the effect that this alleged misconduct had upon her judgment, if any?

MR. HALEY: No, I don't your Honor. *State* vs. *Kristich*—that is a difficult way to prononuce it, Kristich, which is 226 Or. 240, holds to the contrary. The *Dad's Old Fashioned (sic) Root Beer* vs. *Thomas* (sic), 225 Or. 166, is another one in which they say, "We cannot say that it is clear that misconduct could not and did not influence the jury." The Kristich case says this, your Honor, which is real important if we are going to go into that point,

> "The state would have us hold that the defendant must show prejudice. We think that is not the best rule and has not been followed by this Court."

THE COURT: Let me look at this Carson case, because you are both citing it, I think.

MR. HALEY: That's right, and I am taking the Kristich case out of Carson vs. Brauer.

THE COURT: (Following research) There is no [fol. 108] doubt about it.

I will overrule your objection and the answer will stand.

MR. HALEY: May I just cite one further thing to the Court?

THE COURT: I think this case of Carson vs. Brauer leaves more doubt in the Court's mind about this line of inquiry.

MR. HALEY: The Oregon Law Review, Vol. 40, No. 3, at page 226, discusses this situation and discusses Snyder vs. Moe, a case in which there were affidavits to impeach the verdict of the jury.

THE COURT: But this isn't what we are trying to do here.

Let me read to you from this case at page 759.

MR. HALEY: Yes.

> THE COURT: (Reading) "In the case now at bar the circuit court did not determine whether the bailiff's remarks had prejudicial effect upon the jurors. The circuit court felt itself bound by the Kristich decision."
>
> Now, listen to this:
>
> (Reading) "Unless the remarks actually prejudiced the plaintiff's case, the judgment should not have been vacated and a new trial should not [fol. 109] have been ordered. The cause is therefore remanded to the circuit court so that it may make the necessary determination and rulings."

There has to be a showing that these remarks were prejudicial to some rights of the defendant.

MR. HALEY: Yes, but the—

THE COURT: And this witness has said after hearing all of these remarks that were made, or that were allegedly made, they didn't influence her decision a bit.

MR. HALEY: Yes, but listen to what the Court says, the facts were different, and they are. The case of State vs. Kristich was a criminal case and this is a civil case, which makes the ruling come out different, and what they did was, they sent it back to the circuit court for the circuit court to consider the affidavits as to whether they had actually used them, so they didn't actually pass on that matter because they didn't feel they had to.

THE COURT: Yes, but they were criticizing the circuit court in some manner for not making the determination as to whether the remarks were actually prejudicial in some way.

MR. HALEY: But they were leaving it to the trial court, and we don't think it was this particular thing.

We have made our objection, and I did want the Court to [fol. 110] have this ruling in Oregon Law Review, Vol. 40,—

THE COURT: What is that volume again?

MR. HALEY: Volume 40, No. 3, at page 226. I have it right here and, your Honor, the thing it shows right here is the Uniform Code of Evidence, Section 1 shows this very thing that I say. You can't use the effect of things on their mind, but Section 44 says you can have what did happen.

THE COURT: But doesn't the Court have to make the determination whether things that happened, or allegedly happened, affected the minds of the jury so that the rights of the defendant were prejudiced in some way?

MR. HALEY: I don't think so, and once you have taken that line, going back to the Dad's Root Beer—

THE COURT: I know the Dad's Root Beer case, Mr. Haley. I tried that case.

MR. HALEY: And it was very handsomely done, your Honor. It was a good ruling, I think, a good ruling, and that's one of the things we are relying on.

THE COURT: Well, I won't tell you what I think of the opinion. It is just giving the trial courts more problem than we should have, but I have made a ruling in this matter and you may continue now.

MR. HALEY: Thank you, your Honor.

Oh, excuse me just a second. I understand the ruling that as to the door being open she can testify as to effect [fol. 111] on her. You aren't making a ruling as to future things that we may go into, or the effect of other things?

THE COURT: Well, my understanding of the question was it was a broad question: Now, this juror is asked whether all these matters which she has referred to in her affidavit in any way influenced her judgment.

THE WITNESS: I didn't understand it that way, your Honor. I understood it was the door.

THE COURT: You are answering only to the door incident, that that matter didn't affect your judgment?

THE WITNESS: That's right.

THE COURT: All right.

MR. MARSTERS: Q Now, Mrs. Inwards, do you still have the original affidavit that you signed in front of you?

A Yes.

Q I would like to have you look at paragraph two on the first page, in which you state, "That on one oecasion while we were in the care of the bailiff in reference to the case"—now, in reference to that one occasion, can you pinpoint it as to whether or not it was prior to your deliberations or during your deliberations?

A Certainly,—

MR. PARKER: Your Honor, I would like to object to that. The Attorney General has been over this and the Court went over this with this very question with this [fol. 112] witness before lunch, your Honor, and it's been answered.

THE COURT: No, I think the record would show, Mr. Parker, that this was gone into after lunch, at one o'clock.

MR. PARKER: But the Court certainly went into it, your Honor.

THE COURT: No, if the State feels they care to, they may interrogate this juror further.

Now, do you understand the question now, or do you want it repeated?

THE WITNESS: Please.

(The last question was read, as follows:

"I would like to have you look at paragraph two on the first page, in which you state, 'That on one occasion while we were in the care of the bailiff in reference to the case'—now, in reference to that one occasion, can you pinpoint it as to whether or not it was prior to your deliberations or during your deliberations?")

A It was prior, certainly, because Mrs. Gattman was an alternate juror.

MR. MARSTERS: Q All right. Now, you then further state that you heard Mrs. Gattman discussing the case with Mr. Cormack. Is that correct?

A Well, like you are walking behind someone or some-
[fol. 113] thing, and you just hear them make remarks.

Q All right. Now, you heard them make remarks, and can you say postively to this Court now that they were actually talking about the Parker case?

A Yes, sir.

Q Now why do you—what makes you so sure about that point?

A Well, because Mrs. Gattman is a very—shall we say compassionate person, and I imagine that that was why she mentioned something or other, and our bailiff, being a very friendly person, he tried real hard to keep us all happy. He did an excellent job, I believe, but just an answer, between the two, I think Mrs. Gattman might have brought up the subject, mentioned it.

Q I didn't hear that.

A I think Mrs. Gattman might have brought up the name, Mr. Parker's name, whether she actually said Mr. Parker's name I wouldn't be sure.

Q Now, Mrs. Inwards, this is an important case and a very important question. Do you honestly remember this of your own mind or is this something Mrs. Gattman told you after she had heard the tape recording?

A No, it wasn't. I remember them saying this.

Q All right. Then what was the question Mrs. Gattman asked?

[fol. 114] A That I don't remember specifically. I can't remember the exact words.

Q Well, can you remember the exact words of the reply?

A Well, I think that must have been the time he said, "Don't worry about it. He is guilty."

Q Well, was it the time? That's the important thing, Mrs. Inwards.

A Well, these different things were said at different times and I am sorry, I just can't pinpoint the exact time.

Q But you are saying to this Court now that of your own memory you actually remember her asking a question but you don't know what the question was?

A I said I wasn't sure whether she brought it up or

what. It's just like you are walking behind and you hear somebody talking.

Q Well, it says here in your affidavit, ". . . one of the bailiffs, discussing the case and I heard Mr. Cormack say in response to a query . . ." Is that true or false?

A Well, Mrs. Gattman would ask the questions, yes, or make a statement.

Q Well, the point is, Mrs. Inwards, do you remember?

A Pardon?

Q The point is do you remember her asking a question?

MR. HALEY: Your Honor, she has been over this. She has answered the question. I would object to going [fol. 115] over and over.

THE COURT: No, this is cross-examination.

MR. HALEY: I appreciate that,—

THE COURT: I think this is a proper line of inquiry. We need to know all about this alleged statement. I am going to overrule this objection.

MR. MARSTERS: Would you please read my question again?

(The last question was read, as follows:

"The point is do you remember her asking a question?")

A Well, actually I couldn't say if it were a question or just a statement by her, or something that brought this answer from Mr. Cormack.

THE COURT: Did you hear the statement or the question made by Mrs. Gattman to Mr. Cormack?

A Well, like I said, your Honor, I don't remember the exact words but I do remember that the two just walked together,—I mean that the—

THE COURT: Now, what "two" do you mean?

A The two that were talking. They were talking.

THE COURT: What is the question which Mrs. Gattman is supposed to have asked Mr. Cormack?

A Well, it states in here, ". . . to a query of Mrs. Gattman, . . ."

THE COURT: All right. What is it? Did you hear [fol. 116] the query, the question?

A Like I say, I was just hearing them talking and I couldn't say the exact words she asked him.

THE COURT: Could you give us the substance of the query?

A Actually it was more of a statement to him.

THE COURT: Can you remember the statement?

A Well, not the exact words, no, but to the effect that —that she didn't think he was guilty,—

THE COURT: All right.

A —or something to that effect. I wouldn't know the exact words; I am sorry.

THE COURT: Then was there anything said after that?

A Not that I can remember, your Honor.

THE COURT: Did Mr. Cormack answer that question?

A Well, like it says here, he had said—that was, I am quite sure, when he said, "Don't worry about it. He is guilty."

THE COURT: And you heard this in your presence?

A Yes.

THE COURT: You heard that part and you remember it accurately?

A Well, I remember it because actually I didn't feel that anyone should be saying that he was guilty at this point.

THE COURT: All right.

[fol. 117] MR. MARSTERS: Q Now, you actually heard him say in substance these words, and you actually heard enough of the conversation that you knew that he was talking about Mr. Parker?

A Yes, sir.

Q There's no question in your mind?

A No, sir.

Q And that hasn't been refreshed by Mrs. Gattman or this other lady, or Mrs. Parker?

A No, sir.

Q All right. Now, I want you to answer this question. The Court will let me ask the question and Mr. Haley

may make an objection, so don't answer until the Court tells you to.

Will you please tell the Court whether or not this statement that you heard in any way affected your verdict?

MR. HALEY: If the Court please, I make an objection to that on the grounds it is inadmissible. This point, assuming that to be true, we do feel that that is an area, that is the type of conduct, this statement, which wouldn't make any difference whether or not it were shown that it affected the mind of the juror, if the statement were made to an actual juror who was in deliberation.

THE COURT: Did you think there is a presumption of prejudice?

[fol. 118] MR. HALEY: I think definitely there is. Now, the cases on that, State vs. Kristich is one. Again,

> (Reading) "Any doubt as to the prejudicial effect of the statement made by the bailiff to the jury are to be resolved in favor of the accused."
>
> Now, this 226 Or. 240.

THE COURT: Is that the Carson case?

MR. MARSTERS: No, that is State vs. Kristich.

MR. HALEY: That is State vs. Kristich.

THE COURT: Give us that citation again.

MR. HALEY: 226 Or. 240.

MR. MARSTERS: It is cited and analyzed in the Carson case, your Honor.

MR. HALEY: Then another one, 221 Or. 359, *Oien*, I believe is the way you pronounce it, *versus Bourassa*. Now this was a civil case. The bailiff in this civil case told the jury, ". . . the judge could not or would not"—he doesn't remember which he said—the court "would not give them further instructions" and they were "on their own."

Now, here's what the court said about that:

> "It was highly improper for the bailiff to disobey the explicit commands of the two statutes immediately above set forth and for him to attempt to exercise the discretion given to a trial judge with reference to the giving of further instructions."

[fol. 119] In other words, just making comments of that type—he is talking here about something he thought the judge would or would not do—and that is a civil case. Now, how much more so in a criminal case where the bailiff is passing on the guilt or innocence of the party?

State vs. *Banks*, 147 Or. 157. In this case a bailiff commented on the guilt to a juror who did not sit. That is sort of like—in this State vs. Banks (sic) he talked to Mrs. Gattman, but in the presence of the other jurors, but the other jurors' affidavit was not produced and they just went on the affidavit of the alternate juror, and the Court held that there was no corroboration and therefore they weren't going to set aside the verdict. The implication is clear, and this is State vs. Banks, all they would have had to do was produce the juror who heard it and who did not deliberate on the case and they would have set it aside.

THE COURT: Give me that citation again.

MR. HALEY: That is 147 Or. 157, and I think it goes without saying, your Honor, that passing upon the guilt or innocence by a bailiff, who was an officer, and I think Mrs. Inwards—I will ask her again her opinion as to the importance a bailiff has,—the Court knows the importance a bailiff has, and for a man this important to pass on that guilt or innocence is such a violation of [fol. 120] due process that it couldn't be allowed, and I do not believe that it is even necessary in this type of a case to go into whether or not it had an effect on her or not. I don't know what her answer would be, but I don't think it is admissible for that purpose anyway. I think that Oregon Bar Review and the sections of the Code of Ethics, Evidence Sections, 41 and 44, are sufficient on that point.

THE COURT: Well, I am going to overrule this objection and permit the witness to answer the question.

MR. HALEY: May I make one more point, your Honor?

THE COURT: Yes.

MR. HALEY: This is *State* vs. *Gardner*. I wish I had brought the Court's attention earlier. This is 74 Advance Sheets, at page 691. Let's see if I can get this.

74 Advance Sheets, that would be a case decided May 16th, at page 691. Now, in this case—

THE COURT: 74 Advance Sheets?

MR. HALEY: 74 Advance Sheets, your Honor. That is No. 13 of Volume 74.

Now, this case—the general holding is that a jury's verdict is impeachable and may be set aside only in "cases of utmost gravity and importance" and "where it is 'manifest that that' " application of the general rule to the contrary "would violate 'the plainest principles of justice,' " so they go into discussing the principles in the [fol. 121] State vs. Gardner case, in which there was—let's see, in that case—oh, there were questions as to what the juror said, one of them who thought he knew one of the witnesses—said, "They have sure cleaned him up," and such as that. On page 696 the Court sums it up this way: (Reading)

> "We wish to emphasize therefore, that although we recognize that evidence of a juror's misconduct may be used, the verdict will stand unless the evidence clearly establishes that the misconduct constitutes a serious violation of the juror's duty and deprives complainant of a fair trial."

THE COURT: Well, how can I determine whether there is any important misconduct on the part of this juror here unless she answers this question?

MR. HALEY: All right. They say:

> "There is no way of stating the principle in more definite form; the limits must be set on a case-by-case basis."

Now, here is the discussion, your Honor:

> "One limitation can definitely be set. The limitation is best expressed in Rule 41 of the Uniform Rules of Evidence, as follows:"

This is the limits they put on it:

> "Upon an inquiry as to the validity of a verdict [fol. 122] or an indictment no evidence shall be received to show the effect of any statement, conduct, event

or condition upon the mind of a juror as influencing him to assent to or dissent from the verdict or indictment or concerning the mental processes by which it was determined."

Now, No. 4—

THE COURT: Here we aren't trying to impeach the juror's verdict. We are trying to determine what effect, if any, the bailiff's statement had upon this juror.

MR. HALEY: All right, but what I want to impress is the Court, in State vs. Gardner, says the Uniform Rules are applicable in Oregon, and Rule 41 is one they recognize, that is, as to the mental processes and the effect of misconduct on the mind of jurors, it cannot be received in evidence, they cannot be questioned on that, but Rule 44 says they may give affidavits as to what actually happened, and that is the difference. In other words, the reason for the Rule is, of course, it's so difficult to say, how can a juror say, "This affected me," or "This didn't affect me"? And the question really is this, your Honor, isn't it, would he have a fair and impartial trial? That's why we are here, and can a person have a fair and impartial trial if a bailiff says, "Don't worry, he is guilty"?

Now, it may be these were stalwart jurors, but can [fol. 123] he have a fair trial in the face of this, and that is why the next reason for the Rule, your Honor. That's why, whether or not this juror was affected by it shouldn't have any effect. The question is, is it a fair impartial trial to have this kind of conduct, and the cases on that are also replete.

I won't take the Court's time citing cases on that because the Court is aware of that, but that is the point.

THE COURT: Mr. Marsters, what do you think about this position? Do you think this comes under Rule 41 of the Uniform Code of Evidence?

MR. MARSTERS: Your Honor, I read these cases and I would agree with the remarks of the Court a minute ago, we are not here trying to impeach the verdict—I don't think he is either, and I think we are here to determine what was the conduct of these jurors, but here we have got an affidavit of an alternate juror reporting

something and talking about something, and I think the question before this Court is, "Did this have any effect on them?"

Now, it's true, your Honor, that if this is actually said, and we will determine that, I think, from all the jurors—if this is actually said—

THE COURT: This will be a fact question.

MR. MARSTERS: This is a fact question and I am [fol. 124] willing to say right here and now in open court to our Honor that I think that was grossly wrong of a bailiff to do that, and I am not so sure on it's face would not necessitate setting aside this man's conviction. I am not arguing that point here and now. I think that is wrong conduct, but the question is, "Did he say it?" And that is what we are here to determine for No. 1, it seems to me, and No. 2, "Was this juror affected by this remark one way or the other?" for the reason that it goes to the very point that they are raising by this entire lawsuit, the post conviction, and that is to set aside this conviction because of this improper conduct affecting their verdict. How it affected it I am not asking and I don't want to know.

THE COURT: You are conceding, however, that if the Court should find as a matter of fact that the statement was made by the bailiff, that this would then warrant granting of a new trial?

MR. MARSTERS: I think it would, your Honor. I might as well be honest with you and I am not here to deny this man anything. I want you to know that, and I think that is what the Court wants to know. The fact that she says it or that someone else says it doesn't make it so. That's why we have called all the jurors.

THE COURT: But you want to go a step further after she says the statement was made in her presence, [fol. 125] you want to now go a step further and reason whether the statement affected her judgment in any way?

MR. MARSTERS: Well, the reason for that, your Honor, is her waivering, peculiar situation with this particular witness in that—as I understand her testimony, she is vague about it. There's been a certain amount of coaching, I would say, in being charitable, in this matter, and I am trying to—leaning towards her attitude to de-

termine whether or not she had that at the time of this verdict. In other words, I am trying to get at this point of whether this is an aftermath now rather than at the time. That's what I am leading up to.

THE COURT: Well, I am going to do this, gentlemen, at this time. I am going to overrule your objection, Mr. Haley, and ask the witness to answer the question that was put by Mr. Marsters.

MR. HALEY: With the understanding that we will pass on the matters later?

THE COURT: We can determine this a little later, and if the Court determines from any of these authorities that the Court was in error we will strike it from the record.

Now, do you remember the question now?

THE WITNESS: Hardly.

THE COURT: Will you start all over again, Mr. Marsters, and rephrase the question?

[fol. 126] MR. MARSTERS: Thank you, your Honor.

Q I would like to get back on the track just a minute. Now, I understand this remark, "Don't worry about it. He is guilty" was made prior to your deliberations?

A Yes.

Q And it was made originally between Mrs. Gattman and the bailiff, James Cormack?

A Yes.

Q And this is while you were out on a walk, or something of that kind, as a jury?

A Yes, at some time or other. There were different walks, of course.

Q And now, having come prior to the deliberations, my question is just simply, did this incident affect you in making your verdict?

A No, sir, it didn't, to the effect—or to—really, because actually I wouldn't let anyone else's say-so affect my way of thinking. I mean I was going to try and consider all the facts—all the facts and take time to consider them.

MR. MARSTERS: Thank you, Mrs. Inwards. That is a very honest answer.

Now, I know I am going over this, but I want to get this other point cleared up.

In the next paragraph, Mrs. Inwards, you say you [fol. 127] heard a discussion with a Mrs. Drake and Mr. Cormack. That is in the third paragraph, and you heard him say, in substance,—you have the words here but, "If there is anything wrong the Supreme Court will correct it."

MR. HALEY: If the Court please, counsel has stated that wrong. It doesn't say there was a discussion between Mrs. Drake and Mr. Cormack. It says she was in the presence of Mrs. Drake and there was a discussion between Mr. Cormack and a man juror.

MR. MARSTERS: I am sorry. I read that wrong. Counsel is correct.

THE COURT: But I think this morning Mrs. Inwards said she didn't make that statement about another man, if I remember.

MR. MARSTERS: That's what I am trying to clear up.

THE COURT: Why not refer her to the specific language of the affidavit, Mr. Marsters?

MR. MARSTERS: Q Do you have the affidavit before you?

A Yes.

Q It reads:

> (Reading) "On another occasion, during a noon recess, while we were walking from the court house to lunch, I was walking with one of the jurors, Mrs. Drake, and walking behind the bailiff, Mr. Cormack, and another man juror, and heard them discussing [fol. 128] the case and heard Mr. Cormack say 'if there is anything wrong, the Supreme Court will correct it.'"

Now, did you hear that?

A Here, again, I suppose I am perjurying myself. I really can't say that I did hear this.

MR. MARSTERS: Okay.

THE COURT: You can't say that you did hear this?

A I remember hearing him say, "The Supreme Court will correct it." That I remember, but whether he was talking to a male juror or a female I just can't remember.

MR. MARSTERS: Q And whether he was talking about this case or not?

A Well, certainly we were on this case.

Q Yes, but was he referring to this case or about the Supreme Court decision on this case? Could it have been a case he read about in the newspaper?

A I couldn't say specifically but it certainly wasn't. I mean as far as my reasoning was concerned it was this case; I mean my understanding that it was this case.

Q All right. I am not trying to change your idea. I want to be sure I understand it. Now, you heard something about "The Supreme Court will correct it"?

A Yes.

Q And that, you say positively you now remember?

[fol. 129] A Yes.

Q All right. And this is prior to deliberations?

A Well, that I couldn't say for sure either, because we did take a lot of walks, I mean back and forth for lunches after we started deliberating, or I mean—let's see. I shouldn't say that.

THE COURT: Well, the question was, was this statement made before your deliberation started—

A What I was trying to reason out is, was Mrs. Gattman still with us, because she was an alternate juror and I was trying to think whether it was while she was with us or not, it would make it during deliberations, do you understand, your Honor?

THE COURT: Well, you are trying to rationalize, Mrs. Inwards. What we want to know is what actually happened, if you can remember.

A Could you remember, your Honor, just which day this was said and that was said?

THE COURT: Well, Mrs. Inwards, I didn't make this affidavit. You made this affidavit and because you made this affidavit counsel has the right to interrogate you about it, and it's either accurate or it isn't accurate, and if there is any part of that affidavit which you now say is inaccurate I want you to tell us.

MR. HALEY: Well, if the Court please, if this is the [fol. 130] line he is taking I am objecting to it, because she has not stated a time on the affidavit. She only said at some time between the time they started the Parker

trial and the time they finished it this remark was made under these circumstances, and she has amply said she doesn't know when it was. I object to any further questioning on that because the affidavit doesn't say any more than that. The question whether or not she should have remembered a specific date is for the Court to learn from the evidence.

THE COURT: We are not concerned with that but we are concerned with the accuracy of this statement that is in her affidavit. She has already told us she doesn't remember the statement being made to another man juror so that's out of her affidavit, so I am going to rule this proper cross-examination, Mr. Haley.

MR. HALEY: Well, do I understand he is going to try to pin down a time outside of the affidavit?

THE COURT: No, he is cross-examining the witness. You had an opportunity to direct her and I am going to rule this is proper cross-examination.

You may continue.

MR. MARSTERS: Q Well, I don't like to belabor it, Mrs. Inwards, and what we are trying to get at is just what you remember about it, not what somebody else told you. If you don't remember all you have to do is say so, [fol. 131] and if you do, that's fine too.

A Well, I remember the remark but I can't remember whether it was during deliberation or before.

Q All right. Thank you.

Now, in the last paragraph I think you already corrected this before the Court, where it says that you observed a female spectator hand a note to Mr. Cormack, you say that that was wrong, that you did not say that.

A Well, I had already had them cross out some following that. I should have had that taken out too.

Q Well, that's an error, isn't it?

A Yes.

Q And all you did see was the bailiff hand to Mr. Kolibaba, if that is the way he pronounces his name,—a note, is that correct?

A Yes.

Q And that's all you know about it?

A Well, certainly. I didn't know at the time that—whether he had read it or not. I mean I saw him hand it to her—to him, rather.

Q Was that of any significance to you at the time?

A At the time perhaps not. I didn't know it was out of order.

Q All right; and will you answer again, please, did that incident affect your verdict in any way?

[fol. 132] A Well, I certainly wouldn't think so. I didn't think of it at the time.

Q All right. On the second page of your affidavit you have two paragraphs there, or the first paragraph there is that you went for a walk and a Mr. Miller was left back at the hotel.

A Well, I had already stated that I didn't know exactly who was left back at the hotel.

Q So the name of the juror is wrong—

A Yes.

Q —and—

MR. HALEY: Now, wait a minute. I object to that, "The name of the juror is wrong." She just said she didn't know who was back at the hotel.

MR. MARSTERS: Then the name is wrong?

THE COURT: The name of the specific juror would be wrong, wouldn't it, Mr. Haley?

MR. HALEY: That is possible, but she can't say of her own knowledge that the name of the juror is wrong. He can ask her to say whether she knows the name of the juror.

MR. MARSTERS: I am sorry.

THE COURT: I am going to rule this a proper line of cross-examination. I will give you an opportunity to redirect the witness if you care to.

MR. MARSTERS: Q As I understand your testi-[fol. 133] mony, you did not know the name of any individual or person?

A At that time I certainly didn't know that any of these things were important or I might have looked into it better.

Q I appreciate that, Mrs. Inwards, and that's why we are asking. When you say a Mr. Miller was left behind

you don't know that that was actually the person involved?

A That's another thing I should have had crossed out, yes.

Q And the next question is, ". . . four of the men jurors declined to go," and as I understood your answer to the Judge this morning that, too, should have been stricken out?

A Well, I know several—some, and I didn't count them to know exactly how many were there at the time.

Q Well, you don't know whether there were four, six or three?

A If you want numbers, no, I wouldn't know.

Q Now, the last paragraph, as I understood your testimony this morning when the Court went over this with you, that the things you have said in the last paragraph in your affidavit refer specifically to what went on after you were in the jury room for your deliberations?

A Yes, sir.

MR. MARSTERS: Thank you.

THE COURT: Anything—

MR. MARSTERS: Just a second, please, your Honor.

THE COURT: Very well.

[fol. 134] • MR. MARSTERS: Oh, yes.

Q Mrs. Inwards, do you know how many bailiffs were in charge of your jury?

A We had three.

Q Pardon?

A We had three at different times. I wouldn't say for sure that three were there at all times.

Q Now, was there a lady juror (sic) with you?

A Bailiff, do you mean?

Q Bailiff, I am sorry.

A Yes, sir.

Q More than one?

A One lady bailiff and two men.

Q As I understood your testimony this morning, that the lady bailiff was very considerate and very careful to guard—

A She was.

Q —you and protect you?

A To follow orders, yes. She carried them out very well.

MR. MARSTERS: Thank you. I think that's all.

REDIRECT EXAMINATION

BY MR. HALEY:

Q Now, first of all, have I coached you at all in the preparation or in testifying concerning your affidavit?

A No, sir, you haven't.

[fol. 135] Q In fact, how often have I talked to you?

A Well, I hadn't talked to you, I called you after I received this subpoena and I couldn't reach you, and Saturday you called and other than that, that's the only time I have talked to you since I saw you at your office.

Q And did I state what your testimony should be?

A No, sir, you didn't.

Q In fact, what did I stress to you?

A Well, you were trying to put me at ease because you knew I was rather upset.

Q And what did I say we were all interested in?

A The guilt or the innocence of Lee Parker.

Q Well, the truth is the thing I was interested in, isn't it?

MR. MARSTERS: Please the Court,—

THE COURT: Now, let's let the witness testify.

A He actually didn't say "the guilt or the innocence," your Honor. I shouldn't have said that. Actually—

MR. HALEY: Q Not telling you how to testify?

A He wasn't telling me.

THE COURT: Now, she is trying to tell us, if you will give her an opportunity.

MR. HALEY: Okay.

THE COURT: You interrupted before she had a chance to complete her answer.

[fol. 136] MR. HALEY: All right.

THE COURT: Now, can you tell us?

A Well, Mr. Haley knew that this was rather upsetting to me and he had called. First he asked me how I felt and I said, "Well, that's a rather silly question at

this point," you know, having received a subpoena and so forth, but he tried to ease my mind that it wouldn't be as bad as I thought it would be. —To tell you the truth, your Honor, it's worse.

MR. HALEY: Q Did anybody else ever coach you on what to say?

A No.

Q And the question of recollection here, you do recall, do you not, remembering at the time of the trial these specific events.

A Yes, sir.

MR. MARSTERS: Just a minute,—

MR. HALEY: Q And you had thereafter—

MR. MARSTERS: Just a minute. Just a minute.

Your Honor, now I know we are belaboring this, but he is asking her leading questions, and general questions and "these events" don't mean a thing in this court of record. I don't know what he is talking about.

THE COURT: Yes, the question is rather vague and I will ask you to be more specific.

[fol. 137] MR. HALEY: Q Specifically, did you make an effort to get out of your mind things which you knew at one time?

A Yes, sir.

Q And did you, by discussing with others, Mrs. Gattman and Mrs. Drake and myself, refresh your recollection of things that you had already known?

A Yes, sir.

Q Yes. Now, as to whether Mr. Miller took—stayed home or not, when you signed that affidavit you believed that was Mr. Miller who stayed behind, didn't you?

A Well, yes, I believed it.

Q Because we had discussed it?

A Yes, we had discussed it.

Q And it was a general consensus of opinion that that's who it was, and you agreed?

A Yes.

Q And the Attorney General here has made quite a point of the fact that of your own knowledge at that time you didn't know it was Mr. Miller?

A Yes, that's right.

THE COURT: Well, Mr. Haley, let's be sure we understand each other. The affidavit which the witness has before her is her affidavit. It isn't—

MR. HALEY: That's right. I appreciate that.

THE COURT: It isn't anyone else's statement—affidavit,—

[fol. 138] MR. HALEY: Yes.

THE COURT: —and she has been given an opportunity to make correction on it and she is stating it isn't true that Mr. Miller stayed behind.

MR. HALEY: If I might disagree with the Court, I don't think she said that was not true. She said when she made that affidavit she thought that was true, and the way she arrived at that was through discussion with other people.

Correct me if I am wrong, Mrs. Inwards.

A That's how it came about, uh-huh.

THE COURT: In other words, you heard the other jurors talking about a Mr. Miller?

A When we were in Mr. Haley's office and we were asked these questions.

THE COURT: Do you actually know of your own personal knowledge whether Mr. Miller stayed at the hotel?

A No, your Honor.

THE COURT: And do you know of your own personal knowledge that four of the men jurors stayed behind?

A I know some of them didn't go.

THE COURT: Did four of them—

A Your Honor, if I had known—if I had ever had anything like this done before I would have—an affidavit is something very foreign to me. I had no idea that every little pinpoint—

[fol. 139] THE COURT: But don't you understand that an affidavit is a statement under oath and you swear to its accuracy?

A Yes. I realize that I was at fault. Yes, I am sorry. I was at fault and I am sorry.

THE COURT: You don't need to be sorry.

A I should have taken each point by point. No one explained this to me, all these—these—I do know that

some stayed behind, as far as this was concerned, but I didn't realize I had to know exactly who it was—

MR. HALEY: In other words, Mrs. Inwards, we discussed those being left behind and we arrived at a figure of four and put that down and you thought that was adequate to the occasion?

A Yes, yes, yes.

Q And you believed when you signed that, that that was an accurate statement?

A That's right.

Q It could be three or could be five?

THE COURT: Now, Mr. Haley, I think we ought to swear you and put you on the witness stand. Let the witness answer the question. She is your witness. These questions are all leading and suggestive.

MR. HALEY: Of course, your Honor, I objected strenuously to the way she was cross-examined and the Court gave me this opportunity to rehabilitate—not rehabilitate—

[fol. 140] THE COURT: I will give you an opportunity to redirect the witness but you are testifying here. The State has the right to rely on the accuracy of this affidavit. This is a statement made under oath by this witness.

MR. HALEY: That's right, your Honor, and I want to get over to the Court, because of the importance of this, that this woman is capable of making this affidavit, knowing it to be the truth, and still have a variance as to a specific name or a number or something like that. This isn't a witness who has got a phony story or illegally went into an affidavit.

THE COURT: I will give you an opportunity to argue the case later. Right now I want to know, do you have anything further you want to ask this witness?

MR. HALEY: Yes, I do, your Honor.

Q Mr. Marsters asked you whether or not the words, "Don't worry, he is guilty" had an effect on you. Much of the things that happened at the trial you don't remember, do you?

A A good deal, yes.

Q But you do remember those words, don't you?

A Yes, sir.

Q In fact, you don't even remember really whether or not that conversation, "Don't worry, he is guilty," was in the jury room or out on the street on a walk, or what, do you?

A I don't remember which conversation took place [fol. 141] exactly where.

Q But you remember those words, don't you?

A I did hear them, yes.

Q They had an effect on you, didn't they?

A Well, I did think at the time that no one should have been making a statement like that, let alone—

THE COURT: Just a minute. You didn't answer the question. Did that have an effect on your verdict and judgment in this case?

A Well, I wouldn't be taking anyone else's word, if that is what you mean.

THE COURT: No, you can answer that "Yes" or "No" and make any explanation you care to. You already answered it once, but it was asked you again by Mr. Haley. Did the fact that you heard a statement made by the bailiff to the effect that Mr. Parker was guilty, affect you in any way in your decision of this case?

A Maybe this isn't what Mr. Haley would like me to say but I don't think it did, really, because I am quite capable of figuring out my own.

THE COURT: Well, it isn't what Mr. Haley wants you to say. You understand that?

A I understand.

THE COURT: We are trying to get at the truth here. This is a very important matter.

[fol. 142] A I just threw that in. I am sorry. I didn't really mean that but I am afraid he will think I am not a very good witness, but actually it didn't, because at the time I felt that he shouldn't have said it and no one else should have said it at the time, because we hadn't gone through all the points of this.

THE COURT: Well, I think now she has answered the question.

MR. HALEY: Yes, she has that question of the Court, but you see, I asked another question.

Q My question was, "That statement did have an effect on you, didn't it?"—

A Oh, sure.

MR. HALEY: Just a minute. I didn't ask whether it affected her verdict. That is an improper question and I wouldn't ask it. What I asked is, "This statement did have an effect on you, didn't it?" You remembered it?

A Yes, sir.

Q A lot of things you forgot and a lot of things you have remembered, but that did make an effect on you?

A A lot of things I had to forget. My husband made me.

THE COURT: What do you mean by saying it had an effect on you?

A What I meant, your Honor, is I thought no one should be making a statement like that at the time.

[fol. 143] THE COURT: Was that the extent of the effect it had on you?

A I think so, at the time.

MR. HALEY: Q You think so? You aren't sure?

MR. MARSTERS: Now, please the Court,—

A Well, I am quite sure because I am rather a stubborn Norwegian. My husband says once I get my mind made up it is made up.

THE COURT: I think she has answered the question.

MR. HALEY: Well the State has gone into this, your Honor, and I think I have a right to.

THE COURT: I think she has answered the question.

MR. HALEY: Let me ask another question.

Q You say you are rather stubborn and you are going to stick to that, but you didn't agree with the verdict that was rendered, did you?

A That's right. I didn't think it was right.

THE COURT: Now, I will object to that—I am sustaining an objection to that question. That is an improper question.

MR. MARSTERS: I have an objection, your Honor. This is redirect and isn't cross-examination. He is trying to impeach his own witness. I don't like to object, but there should be some limits.

MR. HALEY: Well, I will withdraw the question, [fol. 144] your Honor.

THE COURT: Well, all right.

MR. HALEY: Q Talking about walking up to the coffee shop for lunch behind Mr. Cormack and another juror, it says in your affidavit that it was a man juror. Now, at the time—would you tell the Court why we have that down there, why you have that down there, it's your affidavit? Just tell the Court how that happens to be down there. It doesn't say "a woman juror." It says "a man juror."

A Yes, I am trying to remember now and I can't—

THE COURT: Now, page 1, line 23, the statement is contained on the first page in line 23.

MR. HALEY: Q Well, let me ask you this question.

MR. MARSTERS: Let her answer this one first.

THE COURT: Let her answer the question.

MR. HALEY: I think I could help her by asking another question.

MR. MARSTERS: I am sure you could.

THE COURT: Let's let her answer the question you have asked her.

Do you recall the question now, Mrs. Inwards?

A Yes, whether it was a man juror. I can see a man, yes; it must have been a man juror. I can see him talking to Mr. Cormack.

MR. HALEY: Q All right. Now, let me ask you this,—

[fol. 145] A But I can't—

Q —you don't know which man it was?

A No. It was a man.

Q To the best of your recollection it was a man, isn't that right?

A Yes, sir.

Q And that's why you have it in your affidavit?

A Yes, sir.

Q Now, let me ask you this. You did believe that what they were talking about was the Parker case, didn't you?

A Certainly.

Q All right. And of course you did hear the words, "The Supreme Court will correct it," or, "Don't worry,

if you make a mistake the Supreme Court will correct it"?

A Yes.

THE COURT: Now, that isn't what the statement says here, "If anybody has made a mistake the Supreme Court will correct it." The statement that is being attributed is this, "If there is anything wrong the Supreme Court will correct it."

MR. HALEY: I am sorry. That's how I recalled, but you see how we tend to forget these things.

THE COURT: All right.

Now, anything further from this witness?

MR. HALEY: Yes, if the Court please.

[fol. 146] Q As to this letter that you received, State's Exhibit 5, I believe, you don't know whether that is the exact contents, that exhibit, as the one you received, do you?

A I wouldn't say it is just word for word, no.

Q If it wasn't word for word it wouldn't be a copy, would it?

A No, I couldn't say it was.

MR. HALEY: All right. I have no further questions.

THE COURT: Anything further, Mr. Marsters?

MR. MARSTERS: Nothing further, your Honor.

* * * *

[fol. 148] ELIZABETH RUTH DRAKE was thereupon produced as a witness in behalf of the Plaintiff, and, being first duly sworn, was examined and testified as follows:

(Thereupon, a 2-page typewritten affidavit signed "Elizabeth Drake" and bearing the signature of "George P. Haley," Notary Public, was marked for identification PLAINTIFF'S EXHIBIT 6.)

DIRECT EXAMINATION

* * * *

[fol. 150]

* * * *

MR. HALEY: Q Mrs. Drake, are you nervous?

A Oh, I suppose so.

THE COURT: Now, Mrs. Drake, you don't have to be nervous. This is a hearing here in which we are trying to determine what the truth is, so I don't want you to feel you should be nervous in any way, so if you will just tell us the truth that will be fine.

THE WITNESS: Well, I just won't think about it. If I am nervous I can't help it to some extent.

MR. HALEY: Q Mrs. Drake, I hand you Plaintiff's Exhibit No. 6 and ask you if you can identify this?

A Yes, I can.

Q This is the affidavit taken in my office, is that right?

[fol. 151] A Yes, it is.

Q And that is your signature thereon?

A Yes, it is.

Q And I notarized it in your presence?

A Yes, you did.

MR. HALEY: We offer it in evidence, your Honor. This is the original attached to the petition.

MR. MARSTERS: No objection.

THE COURT: The exhibit will be received.

(The above-described exhibit, so offered, having been previously marked for identification, was thereupon further marked as admitted in evidence as PLAINTIFF'S EXHIBIT 6.)

MR. HALEY: Q Now, Mrs. Drake, you were a juror, were you, on the case State of Oregon versus Lee Parker?

A Yes.

Q And that was on or about the 25th of April, 1961, that you were sworn in as such juror?

A Yes.

Q And you were on the whole case and were in the deliberations too, were you?

A Yes.

Q You have stated in your affidavit here that during the course of the trial and while you were recessed from [fol. 152] trial proceedings and walking to lunch, in the presence of the other jurors, that you overheard Mr. Cormack, one of the bailiffs, discussing the case with one of

the other jurors, and you heard him say something. What was that?

MR. MARSTERS: If it please the Court, I object to counsel leading the witness. Let him ask questions and let her answer.

THE COURT: I will sustain the objection.

MR. HALEY: Your Honor, may I say the reason I do this is to save a lot of time?

THE COURT: Yes, but there is an objection here and the Court is ruling this is leading and suggestive. I want to move this case as fast as anybody else does, but if you gentlemen wish to play it tight this way, we will do it.

MR. HALEY: All right.

Q During the course of the trial did you have occasion to observe Mr. Cormack in relation to the other jurors?

A Yes.

Q And was there any conversation that you heard?

A Well, on this one time I overheard him say that if they found him guilty and if there was anything wrong, the Supreme Court would reverse it.

Q All right. And did you observe at any time during the trial, Mr. Cormack have any connection with any spectators in relation to jurors?

[fol. 153] A No.

Q Well, now, you had in your affidavit here—

MR. MARSTERS: Well, now, just a minute.

MR. HALEY: I think she doesn't understand the question, obviously. That's why I think a leading question on the affidavit is important in this thing.

THE COURT: Oh, now, wait a minute, Mr. Haley. Do you understand the question?

(The recent exchange was read, as follows:

"Q All right. And did you observe at any time during the trial, Mr. Cormack have any connection with any spectators in relation to jurors?

A No.

Q Well, now, you had in your affidavit here—
MR. MARSTERS: Well, now, just a minute.")

THE COURT: There is no question now before the witness.

MR. HALEY: All right.

Q Did you observe Mr. Cormack at any time receive any note from any of the spectators at the trial?

A No, I don't remember having observed that.

Q You have in your affidavit that you observed as you left the jury box and went into the jury room, Mr. Cor-
[fol. 154] mack hand a note to George Kolibaba, one of the jurors. Is that correct?

A Yes, I think he handed him an anniversary card.

Q You think he handed him an anniversary card, but you don't know what it was?

A Yes. I don't know what it was but that was my impression.

THE COURT: Who told you it was an anniversary card?

A I don't know. I have that impression, that it was an anniversary card.

THE COURT: No one told you it was an anniversary card? You didn't see the card?

A No, I didn't see the card.

THE COURT: Yet you have the impression it was an anniversary card?

A Yes.

THE COURT: How could you have gathered that impression?

A It may have been said but I don't remember.

THE COURT: All right.

MR. HALEY: Q But you do recall Mr. Cormack handing a note to one of the jurors?

A Yes, I do.

Q All right. And can you tell us about taking walks with the jury during the course of the trial? Did you take walks all together?

A Well, they took several walks and I don't think they
[fol. 155] were ever all together. They took one up to Washington Park, one up to the Park Blocks, one down

window shopping, one to a movie, I don't remember which theater it was; one—

Q You went to a movie?

A We went to a movie.

One down along the waterfront—or down towards the river, took quite a few walks.

Q What movie did you see?

A Fred MacMurray in Flubber, or Son of Flubber, or something like that.

THE COURT: You say you went to a movie down by the river?

A No, we didn't go to the movie down by the river. We went for a walk down toward the river at one time.

MR. HALEY: Q At the movie did you stay for the whole movie?

A Yes, we did.

Q Was there—what were the other features?

A I don't remember. It seems to me that there was some kind of a short travel feature with it.

Q I haven't been to a movie for so long I suppose this question is out of date. Do they have a newsreel before—

A I think there was a short travel feature.

Q Just a travelogue?

A Uh-huh.

[fol. 156] Q They didn't have a newsreel and a cartoon and then the feature?

A There may have been but I don't remember.

Q I remember them in this order. They used to be.

All right. During these occasions, then, at the movie, were all 14 or 15—let me see, how many were there of you? There were 12 jurors, and were there two alternates or three alternates?

A Two alternates.

Q All right. Were all 14 of you together on all of these hikes and movie trips and so forth?

A No, I don't think we were all together on any of these occasions.

Q On the occasions when you went out and those—there were some that were not present that belonged to the jury, is that correct?

A Yes.

Q And where were they, to your knowledge? Do you have any idea?

A They stayed at the hotel, as nearly as I know.

Q Uh-huh. Do you recall an occasion when Mrs. Gattman went walking with you with a shampoo?

A Yes, I do.

Q And do you recall why she happened to be walking with you with the shampoo?

[fol. 157] A Well, she hadn't been planning to go and then they decided that everybody had to go, and I don't think that everybody did go, but she did.

Q Now, you have alleged in your affidavit that Mr. Miller remained behind. It that your recollection of it?

A Yes, as I remember he stayed at the hotel.

MR. MARSTERS: Please the Court, at this time I think we can shorten a lot of this, or at least I hope we can. I don't see what particular importance this evidence would have in the decision of this case one way or the other. It seems to me like it is incompetent, irrelevant and immaterial and hasn't any bearing upon the issues of whether or not this man had a fair trial. The law doesn't prohibit them being separated, and unless there is some specific conduct that they are trying to get in I don't see any reason we have to waste the Court's time about them going to the theater or going for a walk, or Mrs. Gattman having her hair rinsed and not wanting to go out for a walk. I don't think it has any bearing whatsoever.

THE COURT: What do you contend for this, Mr. Haley?

MR. HALEY: I don't contend that it is, but it might be that separation of the jury might amount to denial of due process, or a trip to the movie might or might not. There are cases enumerated in ALR, ALR 33 or 34, I recall there are cases in there, not in Oregon but there [fol. 158] are cases which hold that taking jurors to a movie is definitely prejudicial, based on the fact that you are getting so much outside influence.

As to the separation, I think the point I am making here is that they have to stay together. Under the

admonition of the Court, they have to stay together to the best of their ability, and yet realizing this rule they still leave people behind. How are they taken care of? How are they protected in the absence of the others? It denies due process. It is very important, like negligence compared to gross negligence. A bunch of little negligence amounts to gross negligence.

THE COURT: There is no evidence that if there were other jurors who remained behind, there is nothing in the record to indicate there wasn't a bailiff with them.

MR. MARSTERS: That's right, your Honor, and that's my point.

MR. HALEY: Well, the only evidence we have is that we don't know whether a bailiff was.

THE COURT: Well, the presumption is there was a bailiff unless you have evidence to the contrary. The evidence here is there were three bailiffs assigned to this case, and unless you have evidence that some of these jurors were left without the presence of a bailiff, then I would think all of this is immaterial with reference to some going to a movie and some not, and some taking a walk and some not.

[fol. 159] MR. HALEY: Your Honor, in *Downes* vs. *Plank*, in Vol. 78, Adv. Sheets, page 571, this indicates they aren't even going into the question of whether or not they determined that anything had happened that was bad. They just said a separation of the jury is, in fact, bad.

THE COURT: Well, let's look at that case. What is the name of it?

MR. HALEY: Downes vs. Plank.

THE COURT: You say 78 Advance Sheet?

MR. HALEY: 78 Advance Sheet, at page 571.

THE COURT: I assume you have that name there, Mr. Marsters?

MR. MARSTERS: Yes, I have.

THE COURT: Do you agree with his interpretation of the law in that case?

MR. MARSTERS: Your Honor, it's a simple case, personal injuries or negligence, and I will just be frank with your Honor I am not familiar with it. I have read

it but I am not familiar now. I can't answer any questions with reference to it without trying to refresh my memory.

THE COURT: Let's get that case. You are contending that case holds—

MR. HALEY: Let me read the language, your Honor.

(Reading:) ". . . it has been held that, when the statute requires that the court may permit the
[fol. 160] separation of the jury, but must admonish the jury as to their conduct during the separation, the failure to properly admonish the jury prior to separation createes a presumption against the purity of the verdict which must be overcome by the party seeking to sustain the verdict."

This, in itself, of course, is sufficient for our purpose and this was a civil case, and all these cases, like Carson vs. Brauer and now this Downes vs. Plank, when we are dealing with a criminal case it is so much more important. Everything said in here must be twice as true for a criminal case.

THE COURT: Oh, I think, Mr. Haley, this case is referring to a different type of separation. This is after the case was submitted to the jury and they have been discharged and then brought back.

MR. HALEY: I appreciate that, but the principle is the same and the danger is the same. That's what we are after, is protection of the purity of the verdict. That's what they are talking about there, and our case we don't have anything right at point on it, and if this is the first time, then I am raising it now, but I think the Court has to decide on it, and one of the things that would make it decide is this Downes vs. Plank.

MR. MARSTERS: Your Honor, I don't understand an Oregon law that requires the jurors to not be per-
[fol. 161] mitted to be separated. The thing that the law prohibits, as I understand it, is that they shall be prohibited from contacting other persons. If they are left in the custody of the bailiff and under the guard of the bailiff, and no one is permitted to have access to them, they are complying with the law of Oregon as I understand it, and I don't see how this Downes case or

anything about where jurors were allowed to go home where they are contacted or something, has to do with this case.

I agree if they have evidence that these bailiffs permitted these jurors to go home or somewhere apart from the bailiffs, that is something different, but if it is the jury's testimony that the men went someplace and the women went someplace else, I don't think that has anything to do with it; that is just baloney.

THE COURT: I am inclined to agree, Mr. Haley, unless you assure the Court that you will tie this up to the fact that there were some jurors who did not accompany the other jurors on the trip, and that they were permitted to remain in their room or some other place outside of the presence and custody of a bailiff. Unless you can tie this evidence to that I am going to rule it is immaterial.

MR. HALEY: May I say this then, before the Court rules on it? The problem we are faced with now is this. This man is the defendant (sic) here and every pre-
[fol. 162] sumption should be given to him.

Now, frankly, if the jurors are separated and one juror testifies that the other jurors stayed behind and she doesn't know whether a bailiff was with them or not, I think until they can produce some evidence to the contrary it can be presumbed that we don't know. We have no way of knowing this.

THE COURT: But you could not attach such a presumption where the evidence in the case is that there were three bailiffs assigned to this trial. Now, if there had been only one bailiff assigned to the trial and one bailiff escourted all of the jurors to a movie or for a walk, this presumption might attach, but here we have the evidence that there were three bailiffs assigned to this trial.

MR. HALEY: Well, let me just ask a couple of questions of her. I did not examine on this point.

Q Was there ever a time, Mrs. Drake, where you yourself, or the group with whom you were, walked without the company of a bailiff?

A Not to the best of my knowledge.

Q To the best of your knowledge the bailiff was with you?

A Yes, there was—I am not sure so I surely wouldn't say it, but when we walked up to Washington Park Mrs. Gattman was feeling short of breath and so on, and I walked around another way with her. Now, whether [fol. 163] there was a bailiff with us, I just—I don't remember there being, but there probably was. I won't say there was not.

Q But as to those who remained behind you, you know this.

Let me ask you this. How many bailiffs walked with you?

A Mrs. Blomquist and possibly the other—not Mr. Cormack, possibly the other bailiff, was with us. I am not sure. I can't remember.

Q Was there a time when all three bailiffs walked with you, to the best of your recollection?

A I don't remember that they did.

Q All right. Now, during the course of the trial and prior to deliberations, do you recall conversation in the jury room? I mean, roughly the conversation?

A It was—there was a lot of conversation. It was general. I really don't remember anything specific.

Q Do you recall the general area of conversation prior to your deliberations, while you were in the jury room, during recesses? Did you discuss the case, for instance? Did others discuss the case?

A I didn't.

Q Did others?

A I can't remember anything specific being said, but it seems to me there were things that were said regarding the case.

[fol. 164] Q You don't remember the specific words, but you remember that there was a conversation about the case, is that it?

A Yes.

Q And what was the general feeling that you derived from this conversation?

A I have an impression—

MR. MARSTERS: Now, just a minute, your Honor. I don't think the Court is interested in that; only what was said.

THE COURT: I am going to sustain this objection.

MR. HALEY: Well, she has already testified, your Honor, that she doesn't remember specific conversation, but she has stated in her affidavit as to a fact, an impression made on her, and I think she is entitled to report the impression made on her.

THE COURT: Do you have any objection, Mr. Marsters, to having this witness tell about her impressions?

MR. MARSTERS: Yes, your Honor. I want to know what was said.

THE COURT: I am going to sustain this objection. Can you recall any specific conversation by any juror, made in your presence, or in your hearing, about this case, prior to the time that it was submitted to you for your deliberation and decision as a jury?

A No, I don't.

THE COURT: I think that is a pretty frank answer [fol. 165] to a direct question.

MR. HALEY: All right, but I will just ask this one question again.

Q There was conversation but you don't remember it specifically, about the case, wasn't there?

A Yes, but it was general and I only have the impression of what was said and I don't know the specific person or the specific conversation.

Q Yes, but my question is, it was about the Parker case?

A Yes.

Q Yes. Now, you have stated in your affidavit that, as a matter of fact, there was much discussion in the jury room—is that correct—prior to the deliberation?

A Yes, I think a good many of the people were talking most of the time.

Q And this was about the Parker case, wasn't it?

A Not all—they weren't always talking about it, no.

Q No, but there was much discussion about the Parker case, wasn't there? Isn't that correct?

A Yes.

THE COURT: What do you mean by "much discussion about the Parker case"? What does that mean to you as you make that statement, Mrs. Drake?

A Well, it's only the impression I have of over that period of time people referring to the case or things that [fol. 166] they thought about it, and so on, but I don't remember any specific things that were said or any certain person that said it.

THE COURT: You were all admonished not to discuss the case among yourselves during the course of the trial, weren't you?

A Yes.

THE COURT: Now, are you telling the Court that some of the jurors did disregard that admonition and did discuss the case during the trial? Is that what you are telling the Court?

A Yes, there was discussion of the case.

THE COURT: Can you tell the Court any specific jurors who discussed the case, or any specific statement that was made in your hearing?

A No, I can't.

THE COURT: Anything further?

MR. HALEY: I have no further questions.

CROSS EXAMINATION

BY MR. MARSTERS:

Q Mrs. Drake, is it possible that you are confused as to the time of the conversations which you are just giving your impressions were had as having occurred after the case was given to you so that you could discuss it and [fol. 167] deliberate on it, as distinguished from during the course of the trial?

A Yes, it could be possible.

Q Now, Mrs. Drake, I notice in your affidavit you state, "If there is anything wrong the Supreme Court will correct it." That is the exact wording that was in the affidavit of Genevieve Inwards, and I understood you to say on direct examination that, as you remembered the statement, Mr. Cormack allegedly said, "If the jury found Mr. Parker guilty and there was anything wrong the Supreme Court would correct it."

A That was the sense of the thing. I don't remember the exact wording, but that was what was meant.

Q Now, where were you when you heard this?

A I was walking behind—I think Mr. Cormack was walking beside a man and he made this remark to the man.

Q And you were walking directly behind him?

A Well, I remember being behind and hearing him make this statement.

Q So you don't know whether there were any other jurors ahead of you or in between you or not?

A I don't remember any being between us. As I remember he was just ahead.

Q And you do recall specifically that they were talking about the Parker trial, the one that you were a juror on?

A I don't remember any other conversation or I don't [fol. 168] remember any conversation. I just remember that, overhearing that.

Q Well, the point of it is, was it clear to you that Mr. Cormack was at that time discussing the Parker case, or could he have been discussing another case that he had read about in the papers, for example, or going on at the time?

A No, as I remember it he said, "If you find him guilty" which would—I definitely had the impression it referred to the Parker case.

Q Now, did you receive a letter from Mr. Parker?

A No, I didn't.

THE COURT: Was your answer, No, you did not?

A No, I did not.

MR. MARSTERS: Q And did you—you went with Mrs. Gattman and Mrs. Inwards to the home of Mrs. Parker and listened to a tape recording?

A I didn't go with them. I went at the time that they did.

THE COURT: Pardon?

A I went at the same time they did. I didn't go with them.

MR. MARSTERS: Q Well, that's what I meant. You were all in the home together, weren't you?

A Yes.

Q And you heard a tape recording?

A Yes.

Q And what was your version of what the tape said?

[fol. 169] A The tape was questions which Lee Parker had dictated, asking if we could help him in asking for his appeal for a reversal of the verdict in his trial.

THE COURT: Did he tell you in this tape recording that he was innocent?

A I don't remember that he did. It's possible. The questions were really all that I paid much attention to.

MR. MARSTERS: Q Now, the tape recording was Mr. Parker—at least you were told that it was the voice of Mr. Parker?

A Yes.

Q And were the questions propounded or asked by Mr. Parker directly to you as a juror?

A Yes.

Q And as a result of this hearing of this tape recording and discussing the case between you and Mrs. Gattman and Mrs. Inwards and Mrs. Parker, you eventually went before Attorney Haley and signed this affidavit?

A Yes, but there wasn't very much discussion. At least I didn't have very much discussion with anybody regarding—

Q Well, I am not—I don't mean to imply that it was two or three days, two or three hours, or two or three minutes. There was a general discussion after you heard the tape recording, is that right?

A There was very little discussion.

[fol. 170] Q All right, and you had other general discussion in the office of Mr. Haley in which you were all present?

A He asked us the same questions, more or less.

MR. MARSTERS: I think that's all, your Honor.
MR. HALEY: That's all.

* * * *

[fol. 171] ROSEMARIE L. GATTMAN was thereupon produced as a witness in behalf of the Plaintiff, and, being first duly sworn, was examined and testified as follows:

(Thereupon, a 3-page typewritten affidavit signed "Rosemarie Gattman" and bearing the signature of "George P. Haley," Notary Public, was marked for identification PLAINTIFF'S EXHIBIT 7.)

MR. MARSTERS: Mr. Haley,—excuse me. If that is the original affidavit of Mrs. Gattman, I have no objection and you don't need to take the time.
THE COURT: All right. The exhibit will be received.
MR. HALEY: Thank you, your Honor.
THE COURT: I assume the exhibit you are referring to is the affidavit by this witness?
MR. HALEY: This is an affidavit by Mrs. Gattman, that is correct.
THE COURT: It will be received in evidence.

(The above-described exhibit, so offered, having been previously marked for identification, was thereupon further marked as admitted in evidence as PLAINTIFF'S EXHIBIT 7.)

[fol. 172] DIRECT EXAMINATION

BY MR. HALEY:

Q Mrs. Gattman,—
THE WITNESS: Excuse me just a moment.
May I say something, please?
THE COURT: Yes.
THE WITNESS: Your Honor, I want you to know that I not familiar with Mr. Parker or his family, just since this trial, and the only compassion I have is the heart feeling I have and I am going to be very sorry to

testify. By testifying I am going to hurt a very dear friend. Mr. Cormack.

THE COURT: You understand, Mrs. Gattman, we are here to determine what the truth is, and your testimony will be very important.

THE WITNESS: That's right.

THE COURT: And I assume you will be faithful to the oath which you just took, which is to tell this Court the truth; is that right?

THE WITNESS: Yes, sir, that's right.

THE COURT: All right. Fine.

MR. HALEY: Q Mrs. Gattman, you were a juror, were you, during the Parker trial?

A Alternate juror.

Q An alternate juror.

A Yes.

[fol. 173] Q And you sat in the case right up until the time of deliberations, is that correct?

A That's right, yes.

Q During the trial, then, during a portion of the trial did you ever have a conversation with Mr. Cormack, one of the bailiffs?

A Yes, sir, I am sorry to say I did.

Q And what was said?

A Well, it was just about the middle of the trial, I imagine, and we were on our way to dinner. I was walking besides (sic) him and I made the remark, I says, "That poor devil is already practically convicted."

Q Why did you say that?

A Well, the atmosphere and things that I had heard.

Q What had you heard?

A Well, while in the jury room I had heard talk—not specifically anything particular but just, "He is as guilty as hell," or something, that language, "He is as guilty as hell," or, "He is guilty," and the atmosphere was filled so that with this in mind I knew—I knew that the man was convicted. I knew—I knew because nearly everyone, practically, it seemed to me, was of that opinion—

Q And you had heard snatches—

A And I—

Q And you had heard snatches of conversation of this [fol. 174] type in the jury room?

A Yes.

Q During recess?

A Yes.

Q Do you remember anyone specifically?

A No. I was sort of a lone wolf. I stayed by myself and I just listened, and that's why I know.

Q But you specifically remember this conversation?

A Yes.

Q Somebody said, "He is as guilty as hell"?

A Yes.

Q All right.

A And then I was walking to lunch with Mr. Cormack and I just made the remark, I said, "Poor devil, he is already convicted before he is even tried," and he told me, "Oh, that wicked fellow"—

THE COURT: He said what?

THE WITNESS: He said, "Oh, that wicked fellow, he is going to be—he is guilty."

MR. HALEY: Q All right. And is this the occasion when Mrs. Inwards was near you?

A I presume so. I didn't know there was anybody close to me. Just Mr. Cormack and I were walking together, and later on I found out that the two ladies were walking behind me. I didn't know anybody had heard. [fol. 175] Q All right. Now, during the course of the trial did you observe Mr. Cormack with some notes?

A Yes, I saw him hand one of the jurors a note.

Q Did you see where he got it?

A No, I didn't see where he got it. He just handed him the note, and then another time in the jury room he handed him what—an anniversary card. It was—he made the statement that his wife had sent him an anniversary card, and I understood that his wife had wanted him—

MR. MARSTERS: Now, just a minute.

I will object to that, your Honor, what she understood.

THE COURT: I am going to sustain this objection.

MR. HALEY: Yes.

Q Well, now, you stated in here that you observed a spectator pass a note to Mr. Cormack.

A Well, I did. That was—it was a card.
Q That was the card?
A Uh-huh.
Q And you observed him pass that to the juror without inspecting it?
A I don't know. I never noticed him inspect it.
Q You didn't see him inspect it?
A No.
Q Now, did you observe any juror sleeping during the trial?
[fol. 176] A Well, yes, sir, I did, but you see, I was sitting in this very right—right at the very beginning of the row, and I had to turn around to—to hear the lawyers talk, and as I turned around I saw one of the jurors asleep. I don't know how long he had been asleep.
Q Was that in the front or back row?
A Back row.
Q And you have alleged in your affidavit that was about two minutes, your estimate?
A Something like that. I just glanced at him and saw him sleeping.
Q All right. Now, can you tell us about these walks you took in the presence of the bailiff or not in the presence of the bailiff? Can you tell us about this situation?
A Well, it was on a Sunday and—it was on a Sunday and I understood we were going to stay in that day and I said, "Well, if we were I would like to shampoo my hair," and so Mrs. Drake was my roommate and she said, "Go ahead," and just as—I had it all soaped up and someone knocked on the door and there was Mrs. — the lady bailiff, and she said, "They have all decided to go walking and you have to go," and I said, "Well, it's kind of cold outside and I have just started to wash my hair," and I had on my housecoat, and so she said, "I am sorry but you will have to go."
Q So you walked with them?
[fol. 177] A Yes.
Q Now, did everybody go?
A Well, when I got downstairs there was just a handful and some around there.
Q Some stayed behind?
A Yes.

Q And did you see them in the presence of the bailiff?
A Yes, the lady bailiff was with me and I don't recognize anyone else because I never noticed the other bailiff, but I know Mr. Cormack wasn't with us because he had taken off that day to go home.
Q All right, and on Sunday you went to church?
A Yes.
MR. MARSTERS: Now, please the Court, this, again, raises the same question with this witness. I can't see where we need to take up the Court's time with whether or not these people were separated.
THE COURT: I am going to sustain this objection unless you can show that they were separated without a bailiff being present.
MR. HALEY: All right, but I want to show they went to church, because I am going to make the statement that this, in itself, is improper conduct for a jury.
THE COURT: Go ahead. All right, make your record.
MR. HALEY: Q All right, on Sunday morning, the [fol. 178] 16th (sic) of April—that would have been that Sunday, you went to church?
A Yes.
Q Who did you go with?
A With the lady bailiff, and myself and three men jurors.
Q Okay. It could have been two other jurors?
A Three, three men.
Q You said two in your affidavit.
A Well, I made a mistake.
Q Okay. Now, what can you tell us about the jury room door being open on an occasion? Do you remember that?
A Oh, yes, it was open.
Q Could you hear conversation outside?
A We could hear loud speaking but I didn't hear anything. There was a lot of noise out in the hall, very noisy.
Q And then what happened?
A Mr. Cormack came running in there and closed it very quick, and he said the door should never have been left open, and he closed it.

THE COURT: Did this just happen on this one occasion?

A That I know of.

MR. HALEY: Q You have come to know Mr. Cormack rather well since, have you?

A Yes.

Q And you count him as a dear friend?

[fol. 179] A I count him as—I count him as my friend.

Q Were there more occasions than one when he spoke to you of the crime, of the guilt or innocence—

A No.

Q Just that one occasion?

A Just that one occasion.

MR. HALEY: I have no further questions.

THE COURT: Cross-examine.

CROSS EXAMINATION

BY MR. MARSTERS:

Q Was it just you two together?

A Sir?

Q When Mr. Cormack allegedly spoke to you about the guilt of Mr. Parker, was it just you two together?

A Yes, sir.

Q What did you do about it?

A I didn't do anything about it.

Q Who did you tell?

A I didn't tell anybody.

Q Not at any time?

A No, sir, not till afterwards.

Q Do you mean until after the verdict had been handed down?

A Yes.

Q You didn't talk to a single juror about it?

[fol. 180] A No, sir, I didn't.

Q Did you receive a letter from Mr. Parker?

A No, sir.

Q But you did go to the home of Mrs. Parker and listen to a tape recording?

A Yes, I did.

Q And you were very sympathetic with Mr. Parker at all times?

A Yes, I did, because—

MR. HALEY: Now, your Honor,—

A —they hadn't proved to me that he would be guilty.

MR. MARSTERS: Q And wasn't there some discussion after you heard the tape recording?

A It didn't change my opinion because I figured he was not guilty.

Q That was not what I asked you. Did you have some discussion with the other ladies about the case?

A Oh, yes.

Q All right. And you went up to Mr. Haley's office, and in the presence of the other three ladies you again discussed the case?

A Yes, sir.

Q And the information you have in your affidavit?

A Yes, sir.

Q Now, you have said that some juror was asleep.

[fol. 181] A Yes.

Q Did he tell you that?

A No, sir, he didn't. I saw—

Q How far from him were you sitting?

A I was sitting, like that last row of chairs, and I had to turn around and he was sitting about where that post is (indicating).

Q And did you talk to him about it?

A No.

Q Did he have his eyes closed?

A Yes, sir.

Q Is that the reason you determined he was asleep?

A He had his head hanging down.

Q And you assumed from that that he was asleep?

A I assumed he was asleep.

Q Yes. Now, all of this you remembered independently, by yourself, before you had a talk with Mrs. Parker and before you heard the tape?

A Yes, sir.

Q Were you and Mr. Cormack friends before this trial?

A I had never met Mr. Cormack before.

Q And did you hear the Court instruct you not to discuss the case with anyone?

A Yes, I did.

Q And you understand the words of that, what it meant?

[fol. 182] A Yes.

Q And still you are saying today that you three talked to Mr. Cormack about it?

A I really didn't start the conver—I mean to say, start the conversation. I was merely like I was talking to myself, walking, so sick at heart to know that the man was being sent up just by a bunch of jurors that didn't have time to consider his case, and I just merely says, "Poor devil." I says, "He is getting—he is being convicted before he is tried," and Mr. Cormack turned around and said that to me, and I didn't say no more and he never said another word to me about it.

Q But as I understand it, you didn't discuss it with anyone?

A No, I didn't.

MR. MARSTERS: That's all.

THE COURT: Anything further?

MR. HALEY: That's all.

THE COURT: All right, you may step down.

* * * *

[fol. 184] ROY KENDALL was thereupon produced as a witness in behalf of the Defendant, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MARSTERS:

Q You say your name is Roy Kendall?

A Roy Kendall, yes, sir.

Q And, Mr. Kendall, you are one of the bailiffs in this last Parker trial, State of Oregon versus—

MR. KENDALL: I was, yes.

Q —that we have been talking about here today?

A Yes.

Q And was that the first time you had served as a bailiff?

A No, about four and a half years here in Multnomah County Circuit Court as bailiff at large, but then I was with Judge Bain for—until he retired and died, and so I have had quite a little experience with that.

Q All right. How come you got assigned to this case? Who assigned you?

A Well, Judge Oppenheimer sent Harold Graham up to get me on the case. The Judge wanted me to help Mr. Cormack. He was in charge.

Q Mr. Cormack was in charge of the bailiffs?

A Well, he was bailiff for Judge Oppenheimer, and his court is where the case was.

[fol. 185] Q All right, and how many bailiffs were there?

A Three.

Q And all men?

A A lady bailiff and Mr. Cormack and myself.

Q All right, now, were you on duty at all times throughout the trial and throughout the deliberation?

A Yes, all the way through.

Q All right. And will you tell the Court, please, if at any time during the deliberation, or I mean during the trial, or during the deliberations, that, as far as you observed or knew about, was any of the jury ever permitted to be without the company of the bailiff?

A Never.

Q Now, did you yourself accompany any of the jurors at the time that Mr. Cormack was also along?

A Yes, all the time we were together, we were together if we went to the theater or else went walking, we went out. It's awful hard to keep people together when there is about 17 of them or 14 and three bailiffs, but we kept them together just as much as we could.

Q Did you ever hear Mr. Cormack discussing the Parker case with any juror?

A No, I should say not.

Q Did any juror ever complain to you that he did or was, or anything of that kind?

[fol. 186] A No, sir.

Q Mr. Kendall, there's been some conversation here about a note, Mr. Parker (sic) passing a note to some juror. Did you yourself see that?

A I didn't see, no.

Q Yes, counsel called my attention that I used the word "Parker" instead of "Cormack." Did you ever see Mr. Cormack pass a note to a juror?

A No, I didn't.

MR. MARTERS: I believe you may cross-examine.

CROSS EXAMINATION

BY MR. HALEY:

Q Mr. Kendall, how old are you, sir?

A Well, I am—I was old enough to get laid off the first of the year.

THE COURT: You must be seventy-five then.

A A little better than that.

MR. HALEY: Q Seventy-six, are you?

A Well, I will be seventy-eight.

Q Seventy-eight?

A Uh-huh.

Q Okay. Who swore you in as bailiff?

A Well, I was bailiff at large for three and a half years here. I have been all over the courts, in this court [fol. 187] and all over.

Q In the Parker case who swore you in?

A Judge Oppenheimer.

Q Was that—did he swear you in in the presence of the defendant?

A Yes, he swore me in the defendant's—

Q Right in the record, did he?

A Right direct, that's the way it is done. I was working at the time upstairs with Barney Goldstein, and Harold Graham came down and said, "Judge Oppenheimer wants you to help Mr. Cormack," and I came down and that was it.

Q And you were sworn in in the regular fashion, the reporter taking it down and the defendant present?

A Oh, yes.

Q Is that correct?

A Like we are in all cases. You see, I was already sworn in as a bailiff.

Q But you were sworn just like Mr. Cormack was sworn in?

A Oh, yes, you bet.

Q You stated, I believe, that you diligently stayed with Mr. Cormack, and wherever he went you went, is that correct?

A Well, we went together. With three of us there we tried to keep our bunch together just the best we could.

Q These three bailiffs always stayed together?

A Yes, as near as we could, to lunch, and if we went [fol. 188] to a show we were all together.

Q There was never an occasion when the three of you, for instance, would have allowed a group to walk off by themselves, or something like that?

A Oh, no. They didn't want to. They were a fine bunch of people.

Q In other words, they all stayed together or all walked or all stayed at the hotel?

A Yes.

Q And there was never a time when one bunch went with one bailiff and another bunch with another bailiff?

A No, I don't think so.

Q Was there ever a time that you didn't know of?

A No, I don't think so, because I kept pretty close.

Q And then when Mrs. Gattman and Mrs. Drake and Mrs. Inwards—do you recognize them as being jurors?

A I didn't recognize but one or two of the people. When I came in here today they spoke to me and I asked them what their names were.

Q So when they testified that there were walks taken in which part of a jury would go for a walk and some stay behind, you don't think that is accurate?

A Well, it's awfully hard to keep people all together. Some people walk slower, but we tried to keep them together as best we could.

[fol. 189] THE COURT: Was there ever a time when you took part of the jurors for a walk and part remained in the hotel?

A Not unless someone was with them, and if anyone—we never—we watched that carefully, but we had them all together as far as I ever remember.

THE COURT: Well now, I want you to listen to us.

A Yes.

THE COURT: Did you ever take them out to Washington Park for a walk and part of them remained in the hotel and part went to the park?

A Not to my knowledge. We all went together.

THE COURT: When you went to a movie, did some of them remain in the hotel?

A No.

THE COURT: You all went to the movie?

A That's right.

THE COURT: So you are telling the Court at no time was the jury separated from each other?

A That's right.

THE COURT: All right.

Anything further now from this witness?

MR. HALEY: Q Now, you didn't observe Mr. Cormack receive a note from a spectator and pass it to a juror?

A No, I didn't. I don't recall that.

Q So you actually have no knowledge on that subject, [fol. 190] whether he did or did not?

A I don't know a thing like that, I don't know. He never in my presence and I was there all around.

Q Yes. Well, I mean you didn't follow him around everywhere, did you?

A No, we all worked together, just worked—

Q But there were occasions when he was out of your eyesight, I presume?

A Oh, I suppose there were, yes.

Q So actually, whether he did receive a note from a spectator and pass it to a juror, you have no personal knowledge of this, do you?

A That's right, I don't.

Q And whether or not Mr. Cormack ever made a statement or conversed with any of the jurors, you have no knowledge about this?

A No, sir, I don't.

Q He could just as well have or—.

A Well, it doesn't look natural for a fellow to do that, because we have our instructions not to do those things, you see.

Q You had instructions not to do that?

A You bet.

Q But whether or not he observed those instructions you don't know, do you?

[fol. 191] A Well, I—

Q I mean of your own knowledge you don't—

A Well, I think he did—

Q You think he did, but I mean of your own personal knowledge?

A No, that's right.

Q You didn't catch him at it, did you?

A No, no.

MR. HALEY: Okay. I have no further questions. Thank you.

MR. MARSTERS: I have no questions.

* * * *

[fol. 192] JAMES DENMAN HICKEY was thereupon produced as a witness in behalf of the Defendant, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MARSTERS:

Q Did I catch your name correctly as James Hickey?

A Yes, sir.

Q Now, you were one of the jurors in this Parker trial, were you not?

A Yes, sir.

Q And of course you were there from the start to the end?

A Yes, sir.

Q Will you state to the Court, please, whether or not at any time during the trial, before your deliberations, that you overheard the bailiff or anybody talking to the jurors, or making any remarks to the jurors?

A At the time I have been there I did not hear the bailiff make any such remark, to my knowledge.

Q Did you ever hear Mr. Cormack, specifically, say anything about this case to any juror?

A No, I did not.

Q. On a walk, in the jury room, or in a hotel or movie, or anyplace else?

A No, I did not.

Q Will you tell the Court, please, whether or not, if [fol. 193] you recall, when you were out on walks or to the movie, whether or not you were in the company of a bailiff?

A We were always in the company of a bailiff, sir.

Q And will you tell the Court, please, whether or not you recall whether there were instances when some of the jurors, such as the ladies, went by themselves and the men went by themselves?

As far as I recollect, some of the men walked together, some walked with the women.

Q No, what I am trying to get at, Mr. Hickey, is did four or five of the ladies go to the Washington Park and four or five of the men stay at the hotel?

A Oh, no, sir, not that I know of, sir. We all went together.

Q All right.

THE COURT: In other words, you were never separated as jurors?

A No, sir.

MR. MASTERS: Q Will you please tell the Court whether or not you yourself, or you, overheard any juror in the jury room prior to deliberations, making any statement as to the guilt or innocence of the defendant?

A Not that I recollect, sir. We were given specific instructions not to discuss the case until deliberations.

MR. MASTERS: You may cross-examine.

[fol. 194] CROSS EXAMINATION

BY MR. HALEY:

Q Did you, Mr. Hickey, have Mr. Cormack in your sight at all times?

A Well, that I couldn't recall, sir. He was there, I know, but whether—

Q There may have been occasions?

A Whether he was—

Q There may have been occasions when you weren't listening to him or looking at him or—

A Yes, there might have been somebody in front of me, but as far as being far away, he was never far away.

Q But there were occasions when he might have been out of earshot or eyesight?

A I wouldn't say about earshot. He was never out of eyesight.

Q So you yourself never heard him converse with any jurors yourself?

A No, sir, I did not.

Q But you don't know whether he conversed with a juror, of your own personal knowledge?

A No, sir, I don't.

Q He might as well have conversed with a juror or might not have?

A No, sir, that's right.

[fol. 195] MR. MASTERS: Well, I object, your Honor.

MR. HALEY: He has answered the question.

THE COURT: All right.

MR. HALEY: Q You yourself did not observe Mr. Cormack passing a note from one of the spectators to one of the jurors?

A No, I did not.

Q So you yourself have no knowledge whether he did or did not do so?

A No, I don't.

Q Now, on these occasions when you went to the movies—incidentally, what were the other features of that movie?

A It's been quite a while. I don't know this, sir.

Q You don't recall the movie?

A I recall the Fred Murray (sic) picture.
Q Fred Murray? And what was the name of the Fred Murray picture?
A I don't know. It had something to do with the invention of a golf ball or—
Q Yes. Now, how many walks did you take during the course of the trial?
A Oh, there must have been at least two that I know of.
Q Two. All right. Where did you go?
A One was up to Washington Park and one was down to the river.
[fol. 196] Q All right; and which jurors were with you that you recall?
A Why, all of them.
Q Well, can you name them?
A Not specifically, no; I don't remember all the names, sir.
Q You can't, in other words, tell specifically which juror was there?
A No, I cannot.
Q Do you remember the occasion when Mrs. Gattman had her hair shampooed and—
A No, I do not remember that.
Q You don't remember that?
A No.
Q She had to take a walk, you don't remember that?
A Well, we took a walk but I don't remember—
Q You don't remember her having her hair done up wet and with a towel over it?
A No, I don't.
Q Okay. Well, actually, then, as to anything the bailiffs did in relation to any of the other jurors, you just have no information on, do you?
A I do not, sir.
MR. HALEY: No further questions.
THE COURT: Mr. Parker, do you want to ask him a [fol. 197] question?
MR. PARKER: I will let Mr. Haley ask the juror.
THE COURT: All right.
MR. HALEY: Q Did you ride—did you take a jury view?

A Sir? I beg your pardon.

Q Did you take a jury view? Did you go out to a farm out at Vernonia and look at the site?

A We took a trip with a jury out to Vernonia.

Q Yes. That's called a "view." Who did you ride with?

A I don't recall, sir.

Q Was all the jury with you?

A I think we all went out on the bus.

Q You went out on the bus. You rode out together on the bus and came back together on the bus, is that correct?

A As far as I remember.

MR. HALEY: I have no further questions.

MR. PARKER: We have one more here.

MR. HALEY: Q Do you recall Mr. Cormack taking a telephone message to the jury room?

A No, I do not.

Q Do you recall whether or not, riding out in the bus, the Judge rode with you?

A I don't remember who I rode with, sir.

Q You don't remember whether the Judge was with you or not?

A No, I don't.

[fol. 198] Q Okay.

THE COURT: You don't know whether the Judge was on the bus?

A No, sir.

THE COURT: Do you recall—

A I don't recall whether he was on our bus or not.

THE COURT: Do you know whether he was out there at the jury view?

A Yes, he was there.

THE COURT: He was there. All right.

Now, anything further?

MR. PARKER: Yes, sir. I would like to—possibly—Mr. Haley—

Do you recall if there was one bus or two buses with the jury?

A One bus, sir.

MR. PARKER: Okay. Thank you, sir.

MR. HALEY: I have no further questions.

THE COURT: Mr. Hickey, I want you to search your mind now and answer this question, because there's been some evidence here by some jurors that there was discussion about the innocence or guilt of this defendant before the case was submitted to you.

A Yes, sir.

THE COURT: And there were statements like, "He is [fol. 199] guilty as hell." In all the time that you sat as a juror in that Parker case, did you ever hear a juror make a statement like that, or similar to that?

A I did not hear anyone make that statement, sir.

THE COURT: Did you hear any juror make a statement whether this defendant was innocent or guilty, prior to the time that the case was submitted to you for your deliberation?

A No, sir, I do not remember that.

THE COURT: Do you recall any conversation in the jury room about the defendant prior to the time that the case was submitted to you?

A No, sir, I do not.

THE COURT: All right.

Now, anything further from this witness?

MR. MARSTERS: Not from me, your Honor.

* * * *

[fol. 202] MARGARET C. SHAFER was thereupon produced as a witness in behalf of the Defendant, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MARSTERS:

Q I am sorry. I did not get your name.

A Margaret Shafer.

Q Thank you. Now, you, of course, were one the jurors in the Parker case?

A I was.

Q And, Mrs. Shafer, would you please tell the Court whether or not you, as a juror, ever heard any of the jurors discuss the guilt or innocence of this defendant prior to the time the case was submitted to you for your deliberation?

A I did not.

Q Will you please tell the Court whether or not you ever overheard any juror, man or woman, say something to the effect that the man was "As guilty as hell"?

A No, I did not hear it.

Q Any similar language ever used?

A Nothing of that nature.

Q Would you tell the Court, please, whether at any time that you can recall when you were out on a walk, to the theater, to Washington Park, or any of those places that you have heard mentioned here today, you were [fol. 203] without the company of a bailiff?

A I believe not. I mean I know that we were always with a bailiff. I do recall that I did not go on the walk to the river, which was later the same day that they had gone to Washington Park, but there was a great deal of ado to see that somebody stayed at the hotel with those that did not go, and especially Mrs. Blomquist was most careful to be sure that this was all done in the most proper fashion.

Q Well, are you saying that you did not go on the walk to the river and that there was a bailiff left in charge of you?

A That's right.

Q Will you tell the Court the name of the bailiff?

A I am sure it was Mrs. Blomquist.

Q All right. Did you see the others leave to go on this particular walk to the river, the other jurors?

A I was in my room. I didn't see them.

Q All right. Would you state whether or not you received a letter from Mr. Parker?

A No, I did not.

Q All right. And did you see a note passed by Mr. Cormack to any juror?

A No, I did not.

Q Oh. Did you overhear at any time, Mr. Cormack talking with any juror relative to the Parker case?

[fol. 204] A No, I did not.

Q Did you hear any other bailiff?

A No.

Q Did you hear any other person?

A No.

MR. MARSTERS: You may cross-examine.

CROSS EXAMINATION

BY MR. HALEY:

Q But, Mrs. Shafer,—is it Miss or Mrs.?
A Mrs.
Q Mrs. Shafer, you were not with the jury all the time, though, were you?
A Only on this one occasion.
Q So you were not with them all the time?
A Only on that one occasion was I not with them.
Q That is to say, you weren't with the jury during the whole trial, were you? You stayed behind, didn't you?
A For this particular walk, yes.
Q So on any occasion, then, you yourself have no personal knowledge as to whether Mr. Cormack discussed anything with the jury, or whether he didn't, do you?
A Well, I wasn't within hearing of him at all times, of course.
Q Yes. So you have no knowledge of whether he did [fol. 205] or did not?
A No, but I didn't hear anything.
Q No, you yourself didn't, but you weren't with him all the time, were you?
A That's right.
Q And you yourself have no personal knowledge of whether he did or whether he did not pass a note from a spectator to one of the jurors, do you?
A No, I have never heard anything about that.
Q You just do not know whether he did or didn't do that?
A No, I don't.
Q You mentioned they were always very careful with any of those that did not go. That is to say, others stayed behind too, didn't they?
A I believe there were others, probably women, that particular afternoon, because Mrs. Blomquist stayed back to make sure we were where we were supposed to be.
Q So there were others besides you?
A I believe so.

Q So Mr. Hickey's statement that you always—and Mr. Kendall's statement, the bailiff, that you always went everywhere together was not accurate, was it?

A No. We were always attended by a bailiff, however.

Q Yes, but you were not always together, were you?

A No.

[fol. 206] Q Do you recall going out to Vernonia on the bus?

A Yes.

Q How many buses were there?

A I recall only one bus.

Q You recall one bus. Okay. And where did the Judge ride in the bus?

A As I recall, there was at least one private car following, or with the bus.

Q Who went in the private car?

A Well, I don't recall seeing the Judge on the bus with us, or the attorneys. It would seem more probable that they had gone in a car, but I couldn't swear to that fact.

Q You don't know where they rode?

A No, but there was at least one other car besides the bus.

Q Who was in the—"car following" you say?

A I know all the jurors were together on the bus. Now, I would suppose that the Judge and the defendant and the attorneys would be in the cars.

Q Do you recall Mr. Cormack taking any telephone messages into the jury room?

A No, I do not recall any.

Q All right. Do you recall whether there was a court reporter out at Vernonia?

A No, I don't recall.

[fol. 207] Q There could have been?

A There could have been.

Q But you don't recall one way or the other?

A At that early stage we were not too familiar with everybody.

Q So your recollection isn't too good on the whole thing as it is, huh?

A No.

MR. HALEY: I have no further questions.
THE COURT: Anything further?
MR. MARSTERS: That is all, your Honor.
THE COURT: The witness may be excused.
THE WITNESS: Am I released then?
THE COURT: Yes. I want to ask you one question before you leave.

Now, you have heard statements made by other jurors to the effect that the case was discussed generally among the jurors during the trial. Do you recall any occasion prior to the time the case was submitted to you?

A I don't recall any statements regarding the innocence or guilt of the defendant or the value of the evidence we were hearing. I do think that there was comment, perhaps, on—oh, who they might bring forth or, "How long do you suppose this will last," or things like that, I think were relevant to the actual reason for our being there.

[fol. 208] THE COURT: But you recall no conversation by any of the jurors with respect to the innocence or guilt of the defendant?

A I do not.
THE COURT: All right.
MR. HALEY: Could I have one more question?
Q How long did you deliberate?
A Well, it was roughly 24 hours, a little more than that.
Q Could it have been 26?
A I imagine. I ought to know.
Q There was discussion, then, in the jury room, about the case prior to the deliberation?
A Well, I—as I said, it was incidental to the value—
Q That that you heard was incidental?
A Yes.
Q But it was—you were discussing the case in the jury room prior to deliberation, weren't you?
A In that fashion.
Q Yes, and so Mr. Hickey's statement that there was no conversation about the case prior to the deliberation is inaccurate, is that right?

A I believe he was asked whether it had to do with the guilt or innocence of the defendant, and with that I would agree that I heard none.

Q But the case was amply discussed otherwise.

[fol. 209] I have no further questions.

* * * *

[fol. 210] ARTHUR KENNETH ARNOLD was thereupon produced as a witness in behalf of the Defendant, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MARSTERS:

Q I did not get your name either.

A (Adjusting microphone) Arthur Kenneth Arnold.

Q Thank you.

THE COURT: That will wake up the sleeping juror.

MR. MARSTERS: Q Now, Mr. Arnold, you were, of course, a juror in this Parker case?

A I was.

Q Will you state first whether or not you received a letter from Mr. Parker?

A I believe I did receive a letter. I don't recall the contents.

Q If you saw a copy, or purported copy of one, would you know?

MR. HALEY: I object. He just stated he didn't know the contents so he couldn't identify anything else. I don't know what the materiality is, either.

THE COURT: Well, I don't know—I have never seen the letter yet so I am in the dark about any letter.

MR. MARSTERS: Well, I will get to it in time, your Honor.

[fol. 211] THE COURT: I am going to permit you to answer this question.

Do you recall receiving one?

A Some letter came to the house.

THE COURT: From Mr. Parker?

A From someone about the case. That is all I recall.

MR. MARSTERS: Q Will you please tell the Court whether or not at any of the times that you were on the jury, and prior to deliberation, or during deliberation or any other time that you ever heard Mr. Cormack, the bailiff, discuss the case with any jurors?

A I did not.

Q Will you please tell the Court what your version is of whether or not the bailiffs were with you and the jury was together at all times?

A Well, I think there was an occasion of a walk when three or four stayed home, stayed at the hotel, but—

Q Were you one that stayed at the hotel?

A No, I went on the walk.

Q Did you know whether or not they were left in the company of a bailiff?

A I am sure they were. I think the lady bailiff stayed with them.

Q All right. Will you also tell the Court whether or not you ever observed Mr. Cormack pass a note to any juror?

[fol. 212] A I didn't see that.

Q Will you also tell the Court, please, whether or not you ever heard any of the jurors at any time during recess, in the jury room, or any other time, discuss the guilt or innocence of Mr. Parker before the case was handed to them for their deliberations?

A The only thing I heard in that connection was at times someone would start to say something and then say, "Woops. Can't talk about that," and then we would change the subject. I don't recall any comments made or any discussion of innocence or guilt, but there was a conscious effort on everybody's part not to talk about the subject matter, as instructed by the Judge.

Q Will you tell the Court whether or not any juror—

MR. HALEY: Your Honor, I have sat through and listened to this long, long, line of leading questions and I have attempted to save time and did not object, but I would ask that we do follow that which we had to follow and ask just direct questions, not leading.

THE COURT: All right.

MR. HALEY: I object to the last one as leading.

THE COURT: I will have to sustain the objection.

MR. MARSTERS: Did I understand your Honor to say that the type of information I am asking is leading?

THE COURT: Well, let's say that the last question [fol. 213] was. You asked him if a statement had been made.

MR. MARSTERS: Pardon me. I asked him to state whether or not he ever heard, during any of the time that he sat as a juror on this case and before the deliberations, any juror say, in effect, that the defendant was "guilty as hell."

THE COURT: If that's the question I will overrule the objection and he may answer that question.

A No.

MR. MARSTERS: Q Did you ever hear any such comment in similar language, or purported language?

A No, I do (sic) not.

MR. MARSTERS: You may cross-examine.

CROSS EXAMINATION

BY MR. HALEY:

Q Mr. Arnold, then your version is that three or four stayed home on these walks. Was it three or four?

A Three or four.

Q You don't know which jurors?

A Can't tell for sure.

Q Could it have been two or five?

A Could have been.

Q Could it have been one or six?

A I think that is stretching it.

Q Two or five?

[fol. 214] A I think that is stretching it too. I think it would have been three or four.

Q How do you know this?

A Well, I recall that certain ones stayed back, and I—

Q Which ones?

A I think Mr. Miller is one.

Q Mr. Miller did stay back. All right.

A I think maybe Earle Kidder stayed.

Q Mr. Kidder. Okay. Who else?

A I don't recall any others.

Q You don't recall any others. So it might have been just two, then?

A Might have been, but I think it was three or four.

Q Yes. But these are the only two that you recollect?

A That's right.

Q You weren't aware that Margaret Shafer had stayed back, for instance?

A No, I don't recall that.

Q Are you aware which bailiff stayed, of your own knowledge?

A No, I am not certain of that. I was under the impression it was the lady bailiff.

Q But of your own knowledge you don't know, do you?

A I don't recall.

Q Of your own knowledge you don't know whether a [fol. 215] bailiff stayed with them, do you, of your own personal knowledge?

A No, I don't.

Q And of your own personal knowledge you don't know whether or not Mr. Cormack had a discussion with any of the jurors, or not, do you?

A I—only in this way. I only know I didn't hear it.

Q You didn't hear it, but of your own personal knowledge you have no knowledge whether he did or whether he didn't, is that correct?

A That's right.

Q And as to whether he passed a note to one of the jurors from one of the spectators, you have no personal knowledge of that at all, do you?

A No.

Q Do you recall the jurors traveling out to Vernonia?

A Yes.

Q How many went with you on that trip?

A Well, I thought there was two buses.

Q You thought there were two buses?

A Yes, sir.

Q So the other two jurors were incorrect when they said there was only one bus?

A I am not saying they were incorrect. I thought there were two buses. I thought one had a mechanical difficulty in it and could hardly make the hill up to the well site.

[fol. 216] Q Who went in your bus?

A I don't remember. I think I sat with Miller, as I recall it, but I don't remember the rest of the people.

Q You don't remember anybody?

A No.

Q Do you know where the Judge rode?

A I think they went ahead in a car.

Q Did you ride in the one with the car trouble, or the one with the bus trouble?

A I think I was in the one with——

MR. MARSTERS: Your Honor, I have tried to be as liberal as I could but this isn't in the pleadings, isn't in the case, and I don't know why we are doing this.

MR. HALEY: It is for testing credibility of the witness, what he saw and observed.

MR. MARSTERS: It wasn't in direct, your Honor.

THE COURT: Well, I am inclined to agree with you, but if he wants to make something out this we will go ahead.

MR. MARSTERS: All right.

MR. HALEY: Q You were foreman of the jury, weren't you?

A That's right.

Q Did Mrs. Parker call you relative to this case?

A Yes—Mrs. Parker, did you say?

Q Yes.

[fol. 217] A Yes, I think she did.

MR. HALEY: Okay. I have no further questions.

THE COURT: Anything further now from this witness?

MR. MARSTERS: No, not by me.

* * * *

[fol. 219] WILLIAM J. McKEOWN was thereupon produced as a witness in behalf of the Defendant, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MARSTERS:

Q Mr. McKeown, did you receive a letter from Mr. Parker?

A Yes, I did.

Q And do you remember enough about it, if you saw a purported copy of same, that you would recognize it?

A I have the letter with me.

Q All right. Will you produce it, please?

A Yes, sir (producing letter).

MR. MARSTERS: I would like to have that marked.

THE COURT: Mark it as an exhibit. Very well.

Let's have it marked as an exhibit. Staple the envelope to the letter.

(Thereupon, a 2-page carbon copy of a typewritten letter dated September 7, 1961, signed "Lee Parker" and bearing the handwritten name "Mr. William J. McKeown" in the salutation, together with envelope postmarked Portland, Oregon, September 11, 1961, addressed to Mr. William J. McKeown, 5840 South-
[fol. 220] east Mitchell Street, Portland, Oregon, was marked for identification DEFENDANT'S EXHIBIT 8.)

THE COURT: Will you be offering this letter?

MR. MARSTERS: Yes, I am, your Honor.

THE COURT: Do you have any objection?

MR. HALEY: I haven't seen it, your Honor. I just rather imagine I am going to objection on the grounds of materiality. I can't see where in the world—what's it going to do? It hasn't got anything to do with the issues of this case.

MR. MARSTERS: Oh, I think it has.

MR. HALEY: Well, I think that—

THE COURT: Well, wait until you get a chance to look at it and then I will let you make any specific objection you care to.

This is a letter the witness says is written purportedly by your client, Mr. Parker.

(Mr. Haley examined the exhibit.)

I will ask Mr. Parker, do you have any objection to the letter being received into evidence?

MR. PARKER: No, I have none, your Honor. I wrote the letter in good faith. There is nothing damaging or meant to be damaging in it.

THE COURT: Very well.

MR. HALEY: Well, I haven't any objection to it [fol. 221] going in but I certainly submit to the Court that it's completely immaterial.

THE COURT: Well, if you haven't any objection we will receive it.

MR. JUBA: May I see it?

MR. HALEY: All right.

THE COURT: You may proceed, Mr. Marsters.

MR. HALEY: Wait a second.

Your Honor, could we ask, just to preserve the record, —we would ask that it be connected up some way with the case. May the Court reserve its ruling on whether it be admissible or not on that basis? We object to it. I can't see where it is important one way or the other, but I don't see why the record should be cluttered up by it.

THE COURT: It is offered and your client had no objection and you said you had no objection, so it will be received. Now do you have an objection?

MR. HALEY: Well, yes, in this way, your Honor. We would object to it, and if I said I had no objection I would withdraw it and I ask that the Court pass upon its admissibility after it is connected up, and if it isn't found to be material, then out it goes.

THE COURT: All right. I will reserve a ruling on it then.

MR. MARSTERS: Now I will ask a general question, [fol. 222] your Honor, and if he wants to object, fine.

Q Mr. McKeown, have you heard the questions I have been asking of these other jurors?

A Yes, most of them.

Q Well, then I will have to——

A Well, there were occasions when I have gone out and I have probably missed some of them.

Q All right. I will ask you then. As a juror will you please state to the Court whether or not at any time you heard Mr. Cormack discuss the facts of this case with any juror?

A No, I never did.

Q Will you please state to the Court whether or not at any time as a juror you ever heard any of the jurors, prior to the time of the deliberation, express any opinion as to the guilt or innocence of Mr. Parker?

A No, sir.

Q Did you ever hear any juror use the words "guilty as hell" or words like that?

A No, sir.

Q Will you please tell the Court whether or not there was ever a time, to your knowledge, when the jurors were not in the company of a bailiff?

A No, we were always in the company of a bailiff, to my recollection.

[fol. 223] Q Did you know of any time when some of the jurors were left back in the hotel and others went for a walk?

A Yes.

Q And to your own knowledge, was there a bailiff left at the hotel with them?

A To my knowledge there was.

Q Do you know who the bailiff was?

A No, I couldn't say.

Q Did you, at any time during the course of the trial, ever see Mr. Cormack pass a note to one of the jurors?

A No.

MR. MARSTERS: You may cross-examine.

CROSS EXAMINATION

BY MR. HALEY:

Q What knowledge did you have that a bailiff remained behind with those who stayed behind?

A Excuse me. I didn't understand that.

Q You stated that of your own knowledge a bailiff stayed with those that stayed behind.

A Yes. There were three bailiffs and there was always one with me so I assumed that the others were with those left behind.

Q You "assumed"?

A Yes.

[fol. 224] Q But you don't know of your own knowledge?

A No, I was with one bailiff.

Q So when you stated just now, of your own knowledge you knew a bailiff remained behind with the other jurors, you didn't mean that, did you?

A Well, I meant when I was with a group there was a bailiff with me and I assumed when there was a group behind there was a bailiff left with them.

Q But the question is, of your own knowledge you don't know that this is true, do you?

A Well, I can't say—no.

Q Yes. In other words, your original statement that, of your own knowledge, a bailiff stayed behind, that was not accurate, was it?

A Well, I assumed that a bailiff was left behind.

Q But in answer to my question, your statement originally that of your own knowledge a bailiff stayed behind, that was not an accurate statement, was it?

A Well, I can't phrase it any other way outside of the fact that when I was with a group there was a bailiff with me all the time, and if there was any left behind I assumed that there was a bailiff left with them.

Q But you don't know, of your own knowledge, do you?

A No, I don't know of my own knowledge.

Q And so originally on direct examination you said of [fol. 225] your own knowledge there was a bailiff left with those that stayed behind, didn't you?

A Well, it's confusing but if you want that answer, all right.

Q What answer?

A Well, the answer you are trying to get out of me and I can't explain.

Q Well, my question, then, is, on direct examination your statement that to your own knowledge a bailiff stayed behind with the other group, that isn't an accurate statement, is it?

A Well, no.

Q All right. You mean, No, it isn't accurate?

A No, it is not accurate.

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Q Now, of your own personal knowledge, you don't know whether Mr. Cormack had any conversation with any of the jurors or not, do you?

A No, I don't.

Q And of your own personal knowledge, you don't know whether he passed any notes from spectators to jurors, do you?

A No, I don't.

Q Do you recall the jury's trip to Vernonia?

A Yes.

Q Three buses, two buses, or one?

[fol. 226] A Well, I recall one bus that I rode in with Mr. Arnold, and I recall difficulty we had getting up the hill.

Q Yes.

A Now, whether there was another bus or another vehicle—because the defendant didn't ride out there in our bus.

Q And who did the Judge ride with?

A I don't recall but I believe he rode in our bus.

Q Yes, the Judge was in your bus, wasn't he?

A I believe he was.

Q Yes. And did the reporter ride in your bus too?

A I couldn't say.

Q You don't recall seeing the reporter out there?

A No.

Q Did the reporter go?

A I don't know.

Q To the best of your recollection there was just one bus, which is why the Judge went with you?

A Well,—yes.

Q Now, on these occasions when you were separated, who stayed behind?

A Oh, I don't recall that.

Q You don't remember who went at all?

A No.

Q Just no recollection?

A No recollection of who was left behind when we [fol. 227] went out on our trips, no.

Q But you remember very accurately the conversation in the jury room?

A The conversation in the jury room?

Q Yes. You remember very specifically that no one ever said anything about the guilt or innocence of Mr. Parker?

A Well, as far as I can recall there was nothing said with regards to the case.

Q There could have been, is that right?

A Not in company of me, no.

Q You are very specific about that.

A Yes.

Q That part of your recollection is excellent?

A Yes. Otherwise I would have noticed it, and so I know nothing was said.

Q In other words, if you had hear it, you yourself, it would have been something that would have made an impression on you?

A Well, I don't know.

Q Well, you just said if you had heard it you would have noticed it.

A Yes. We were instructed what to do in the jury room and we were all of us trying to abide by those instructions.

Q Yes. So if you had heard one of the bailiffs comment in this kind, it would have made a profound im-
[fol. 228] pression on you?

A I imagine it would.

THE COURT: Anything further, Mr. Parker? Do you want to ask a question, Mr. Parker?

MR. PARKER: No, sir, your Honor.

* * * *

[fol. 229] HARRIET V. SHADRICK was thereupon produced as a witness in behalf of the Defendant, and, being first duly sworn, was examined and testified as follows:

THE COURT: Will you give us your full name, please?

A Harriet V. Shadrick.

THE COURT: And you were one of the jurors in the Parker case?

A Yes.

THE COURT: Very well.

DIRECT EXAMINATION

BY MR. MARSTERS:

Q Have you been in the courtroom and heard me ask the jurors series of questions about what went on in the jury room, or Mr. Cormack passing notes, and so on?

A Yes, I have.

Q If I were to ask you the identical questions, would there be any difference in your answers?

A No.

THE COURT: Now,—

A The only thing, in regard to the buses, I think it is quite immaterial, I do think there were two buses and I do believe that the Judge rode in a private car, although it seems immaterial.

[fol. 230] Q But as to everything else your answer would be substantially the same?

A Yes.

THE COURT: Now, as to those jurors which you have called, the State—

MR. MARSTERS: Yes, that I am now calling.

THE COURT: Is that right?

A Yes.

THE COURT: In other words, your testimony differs from that of Elizabeth Drake and—

A Yes.

THE COURT: —Rosemarie Gattman and Mrs. Inwards?

A Yes.

THE COURT: Your testimony would be different than theirs?

A Yes.

THE COURT: All right.

CROSS EXAMINATION

BY MR. HALEY:

Q In what way would it be different?

A Well, I didn't hear any of the conversation that they overheard.

MR. HALEY: You don't know whether they did or not?

A No, I don't.

Q Yes.

[fol. 231] A I said I did not hear any of the conversation that they were supposed to have overheard. No, I didn't know anything about that.

Q All right, and in what other ways would it differ?

A Well, let me see. I can't remember—well, the remarks that Mr. Cormack was supposed to have made, I don't know anything about that, and—

THE COURT: How about discussions in the jury room before the case was submitted to you?

A I think that everyone was quite careful about that. There would be times when some little thing would be said and would be quickly changed, the conversation would be changed.

MR. HALEY: Q What "little things" were said?

A I don't know, but when you live with a thing all day, just naturally some little thing might come up in regard to it, and it was just more or less ignored and just a general conversation.

Q So there was some discussion about the case?

A No, not a discussion, just a word mentioned in regard to it.

Q "Just a word." What was the word?

A I don't know. It would just come up in the conversation, like anything would come up in an everyday conversation, but the subject was changed, so naturally it [fol. 232] wouldn't make any impression on me and I don't remember.

Q Could you tell us what came up in the conversation?

A No.

Q So whether or not there was conversation about the case, or not, you don't really recollect?

A No, not to my knowledge.

Q You don't recollect one way or the other?

A I do recollect that there wasn't a great deal of discussion, or discussion, period, in regard to the trial.

Q There was only small discussion in regard to the trial?

A Just a word, maybe, came up occasionally.

Q You feel, I know, it is immaterial, but there were two buses, you say?

A It seemed to me like there were.

Q And what bus did you ride in?

A Which bus did I ride?

Q Yes.

A I didn't ride the bus that broke down, if that's what you mean, but—

Q You rode in the good bus?

A Yes.

Q And who rode with you?

A Well, the woman that roomed with me—well, I think there were mostly women in the bus I rode in, and the lady that roomed with me sat in the seat with me, [fol. 233] and the lady bailiff, I don't know her name, rode with us.

Q Who were the others in the bus, if you remember them?

A No, I don't. I think, as Margaret said, this was just a day or two after the trial started and we were not too well acquainted.

Q You didn't pay much attention.

And you say the Judge rode in the other car?

A That's my impression.

Q You feel Mr. McKeown is wrong in his judgment that the Judge rode along?

A I wasn't on the bus that he rode on, I don't think.

Q Now, you, of your own knowledge, have no knowledge whatsoever about whether or not Mr. Cormack made any statements to the jurors, or not, do you?

A No.

Q And you don't have any personal knowledge whether he passed notes from spectators to jurors, or not, do you?

A No.

Q And were you one that stayed at home on these walks—

A Yes, I was one of the ones that stayed behind, and the lady bailiff stayed with us.

Q Who else stayed behind?
A Margaret Shafer stayed behind.
Q That is Margaret Shafer?
A Yes, the two ladies.
[fol. 234] Q Were there any men that stayed behind?
A I said there were but I don't know who they yere.
Q Did you observe them?
A No, I didn't, because I had an awful cold and I wasn't feeling too well and the lady bailiff took me to my room.
Q Well, then the lady bailiff was not with you more than—
A She took me to my room and where she went from there I don't know.
Q You don't know whether the two men had anybody with them, then?
A I assume they were with her. She was real busy—
Q Well, she wasn't with you?
A She escorted me to my room.
Q And left you alone?
A Yes, in my room.
Q And you don't know where she went after that?
A Well, no.
Q Of your own knowledge, nor do you know who went on the walk, do you?
A How would anybody know?
Q I agree with you.
And you don't know whether any bailiffs, or which bailiffs, went on the walk, do you?
A No, I know the ones that went on the first walk that we went on, but in the afternoon I don't because I didn't go.
[fol. 235] Q Yes. Let me see. I didn't catch your name.
A Shadrick, Harriet Shadrick.
Q In the—do you recall, during the 26 hours of deliberation—would you agree it was about that?
A Yeah, uh-huh.
Q Where did you stay during that time?
A Where did we stay?
Q Yes.
A At the Heathman Hotel.

Q In other words, you would go and sleep and then come back and deliberate some more?

A That's right.

Q And during this time—did you have walks during this time?

A We went for one walk one evening, the lady bailiff took the ladies and we went for a walk.

Q And the men stayed behind and the lady bailiff took the ladies for a walk, and that was during the deliberation?

A Oh, dear me, no. I couldn't say now whether that was during the deliberation or not.

Q It might have been during the deliberation?

A I think we stayed here quite late during the deliberation. I don't think we went for a walk during that time, no.

Q And during the deliberation, then, did you have room service, or were you locked in your room, or how [fol. 236] did that work?

A Well, I can tell you a little experience that's real silly but if it's interesting, or if you think it has any bearing on the thing, I tried to call for room service for coffee, and right away Mr. Cormack came tearing to my room and I thought I had committed a terrible crime, and the girl at the switchboard had gone to him, that I had called for coffee and could we have coffe in our rooms, and I really created quite a disturbance.

Q So you didn't have room service?

A We didn't try any more.

MR. HALEY: I have no further questions.

MR. MARSTERS: I have no further questions.

THE COURT: All right. You may step down, Mrs. Shadrick.

You may be excused.

(Witness excused.)

* * * *

[fol. 246] Portland, Oregon, June 23, 1964.

9:35 o'clock A.M.

THE COURT: Now, will you call your next witness?

FRANCIS SAXON VanSICKLE was thereupon produced as a witness in behalf of the Defendant, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MARSTERS:

Q Mr. VanSickle, you were one of the jurors in the Parker case?

A Yes, sir.

Q And would you please tell the Court whether or not you received a letter from Mr. Parker?

A Yes, sir.

Q Do you know enough about the contents of it that you could tell from looking at another one whether it was substantially the same letter?

A I believe I could, sir.

MR. MARSTERS: I wonder if we could hand to him Defendant's Exhibit 5, or the one that's in evidence, maybe? Is that the 5th? It doesn't make any difference.

(An exhibit was handed to the witness.)

[fol. 247] Q Is that similar to the letter you received?

A Yes, sir.

Q Please answer loud.

A Yes, sir, it is.

Q Did you respond in reply to that letter?

A No, sir, I did not.

Q Mr. VanSickle, would you please tell the Court whether or not you ever heard any of the bailiffs, and particularly Mr. Cormack, discuss the case, the merits of the case or anything about the case with any of the jurors?

A No, sir, I did not.

Q Was there ever a time that you recall when you were on the jury, on walks or to the movies or otherwise, that you were not in the company of a bailiff?

A No, sir. I was always in the company of a bailiff.

Q Will you tell the Court, please, whether or not you ever saw Mr. Cormack ever delivering a note to any juror?

A No, sir, I did not.

Q And will you please tell the Court whether or not at any time prior to your deliberations you heard any juror express an opinion or discuss the guilt or innocence of Mr. Parker?

A No, sir.

Q Did you ever hear any juror use an expression similar to "guilty as hell" or words to that effect?

[fol. 248] A No, sir.

MR. MARSTERS: You may cross-examine.

CROSS EXAMINATION

BY MR. HALEY:

Q Mr. VanSickle, did you go on the walks with the groups?

A I was on one walk, sir.

Q Stayed behind on the others?

A Yes.

Q Who was the bailiff that went walking with the others?

A I don't know. I stayed in my room and I don't know what went on outside my room.

Q Yes. In other words, you don't know whether a bailiff actually went?

A No, I do not.

Q What bailiff stayed with you?

A I don't know. I was in my room. When they said they were going on a walk I went to my room and spent the time reading and I don't know who was there or if anyone was there.

Q It is possible you were left to your own devices?

A It is possible. I didn't leave my room, sir.

Q And you don't know of your own knowledge whether or not Mr. Cormack ever made any comments to the jury about anything, do you?

A Concerning guilt or innocence, no, sir, I never [fol. 249] heard him say anything.

Q Did he say things during the trial other than guilt or innocence?

A No, sir, he never discussed it within my hearing.

Q Within your hearing?

A No, sir.

Q So you have no testimony to give one way or the other, whether or not he did say anything?

A No, sir.

Q And as to passing notes you have no testimony to give one way or the other whether he ever passed a note to a juror?

A That is correct.

Q Do you recall the bus trip out to Vernonia?

A Yes, sir.

Q Was it a bus trip or a car trip, or how did they go?

A Well, the jury traveled in two small buses, divided approximately in half. We were in the lead bus, the bus I was in, ahead of the other. Our bus had a lot of car trouble, that's how I recall there were two, and it put out a lot of black fumes and when we got there the jurors in the other bus were complaining of having to inhale the fumes, and that is how I remember there were two buses.

Q Was the Judge in the bus with you?

A I don't know, sir. It was the second day of the trial [fol. 250] and I don't remember.

Q Do you know how many were in your bus?

A No, I could approximate there were eight, close to that, plus the driver. I can't tell you except approximately.

Q In regard to that letter you say that is similar. You don't recall the words of the letter you got, do you?

A Word-for-word, no, but this is the same tenor.

Q But whether it is verbatim you don't know?

A No.

Q So actually, then, you wouldn't be able to pass on whether or not it was a close copy of it?

A No, sir.

Q Did you call anybody when you got the letter?

A No, I did not.

Q Did you go to the show with the others?

A Yes.

Q And how many jurors went to the show that time?

A I can't say positively. It is my recollection now that the entire jury was there but I can't say positively that this was so.

Q And both bailiffs were there?
A We were in company of at least two bailiffs.
Q It could have been three bailiffs?
A It could have been, yes.
Q Did you observe anybody sleeping or dozing during [fol. 251] the trial?
A No, sir, I was trying to follow the evidence and I didn't watch the rest of the jurors.
MR. PARKER: I didn't understand that, your Honor. I didn't hear it.
THE COURT: May we have that answer read back?

(The last answer was read.)

MR. HALEY: I have no further questions.
THE COURT: Anything further?
MR. PARKER: Just a second, your Honor, if I might.
THE COURT: Any questions you want to ask, Mr. Parker?
MR. PARKER: No, sir, your Honor.
THE COURT: Anything further now from this witness?
MR. MARSTERS: No, your Honor.

* * * *

[fol. 252] GEORGE V. KOLIBABA was thereupon produced as a witness in behalf of the Defendant, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MARSTERS:

Q Mr. Kolibaba, you were one of the jurors on the Parker case?
A Yes, I was.
Q Will you please tell the Court whether or not you received a letter from Mr. Parker?
A Yes, I did.
Q And is the Defendant's Exhibit 5 there in front of you a copy, or similar to the one you received?

A This is the one I believe I received myself, unless it's awful similar to it.

Q That is the one you received?

Will you please answer the question loudly? I can't hear you.

A Yes, that's the one I received.

Q Did you answer the same?

A No, I didn't.

MR. MARSTERS: The State would offer Exhibit 5.

MR. HALEY: May I ask a question in aid of an objection?

THE COURT: You may.

MR. HALEY: Mr. Kolibaba, that exhibit there, do [fol. 253] you know of your own knowledge that that's identical to the one that you received?

MR. MARSTERS: It's the one he received.

MR. PARKER: He just testified it was the one he had received.

MR. HALEY: I didn't hear. I thought we were still dealing with that other one.

THE COURT: This is the one addressed to Mr. Kolibaba.

THE WITNESS: The spelling there is terrific. That's the reason I recognized it.

MR. HALEY: Oh, this is, in fact, the one you received?

THE COURT: Any objection?

MR. HALEY: Yes, I do object to it on the same grounds as I did the other, that it is not material, it isn't tied up, and therefore since it is not material, anything not material is assumed to be prejudicial, so therefore we object to it.

THE COURT: What do you contend for this exhibit, Mr. Marsters?

MR. MARSTERS: Your Honor, I think it has great materiality in this case for the reason that there was effort to contact these jurors, and a letter was received by Mrs. Inwards, who testified here, similar to the ones here. It shows an effort on the part of the defense to—or the defendant, excuse me,—to contact these jurors. [fol. 254] The proceedings then followed up by the wife and the tape recording and sessions in her home shows

an effort to influence these jurors, and it goes to the credibility of these witnesses, and I think it is material.

MR. HALEY: Well, now, may I comment on that, your Honor?

THE COURT: Yes.

MR. HALEY: An effort to contact jurors going to credibility—now, the Court passed on whether or not there would be anything prejudicial about the attorneys here talking to the witnesses out in the hall and we all agreed that this is something that is natural. How else would a person ever develop testimony if he doesn't go and ask somebody, and if that's the reason that it's offered we certainly object to it because this is just the very thing that is done every single time that evidence has to be given. The district attorney here has talked to people too, and we don't raise that as an issue.

MR. JUBA: I object to that, your Honor. I haven't talked to anybody in this case.

MR. HALEY: The State's attorney has talked to people, and the fact that he hasn't talked to one or two of these jurors, I know he talked to some of his witnesses; he had to, and he talked to some of them out in the hall, and the Court passed on that, that's common and expected.

[fol. 255] THE COURT: Well, do we not have one of these letters now in evidence, Exhibit 8, I believe?

MR. HALEY: Well, over my objection. I objected and the Court agreed it was admitted with the understanding if it wasn't tied in or material that the Court would not allow it, and we admitted it for that purpose at that time.

MR. MARSTERS: I think, your Honor, the two letters showing the similarity and this whose question in this court today I think is the result of similar—

THE COURT: The only thing is I am having some difficulty—I have read the letter—difficulty seeing how it tends to prove or disprove any issue in this hearing. It does show these jurors were contacted by Mr. Parker, but there is no contention that there was a wrongdoing in this action.

MR. MARSTERS: I am not offering it to show wrongdoing. I am trying to offer it to show—or at least

it goes, in my opinion, to the credibility of the witnesses who have testified on behalf of Mr. Parker. They are the only three of the jurors that so far, at least, have the story. They are the only ones that went to this house, they are the only ones that heard this tape recording, and the contents of the letter showing Mr. Parker's feelings in this matter, I think, throws considerable light on this case.

THE COURT: Well, it might be a good background. [fol. 256] However, this witness is being asked to identify an instrument, a letter which he received. You are asking that the Court receive it, and yet you are vouching for the credibility of this witness's testimony.

MR. MARSTERS: That's right, your Honor.

THE COURT: So you are not introducing it for the purpose of discrediting his testimony.

MR. MARSTERS: I am introducing it to show that there was more than the one letter, and the similarity of the letters, and it goes to show the effort made to contact these jurors. We have one letter and I want to show the duplicity of it.

MR. HALEY: Wait a minute. By "duplicity" what do you mean?

MR. MARSTERS: Copy, sent out to all of the jurors.

MR. HALEY: You don't mean it is full of "duplicity"?

MR. MARSTERS: Well, not in the legal sense that you and I ordinarily use that word.

THE COURT: Well, I am going to overrule the objection and the exhibit will be received for the purpose of showing a pattern and course of conduct by Mr. Parker to contact these jurors, and by making such a ruling I am not saying this is in any way prejudicial to his case, in any way, merely as background material.

(The above-described exhibit, so offered, having [fol. 257] been previously marked for identification, was thereupon further marked as admitted in evidence as DEFENDANT'S EXHIBIT 5.)

MR. MARSTERS: All right.

Q Now, Mr. Kolibaba, would you state whether or not at any time while you were serving as juror in this case, and before your deliberations, whether you heard Mr.

Cormack talking to any of the jurors about the merits of the case, or anything about the case?

A No, I haven't heard him discuss it.

Q Would you state, please, whether or not at any time, to your knowledge, that you were ever left alone and without the custody of a bailiff?

A No, I was never left alone. The only time was when they put us in our room, naturally—

Q Pardon?

A When they put us in our room, naturally we were left alone.

Q All right. Did you ever see Mr. Cormack pass a note to anybody?

A Yes.

Q Who was that?

A I received a note.

Q And who did you receive it from?

[fol. 258] A From my wife.

Q And what was it?

A Well, it happened to be her birthday and I believe everybody on the jury knew it was her birthday, I happened to mention it, and I bought her a gift and I left it at Reingold's Jewelers, and she wrote me a card saying that Rex and Ray Smith were taking her out to dinner and out to Lodge.

MR. HALEY: I didn't understand that last.

A I said she wrote me a note that Rex and Ray Smith were taking her out to dinner and to Lodge later on, and then I wrote on the bottom of the note and said, "I hope you have a good time. Happy birthday," and I turned it back to the bailiff.

MR. MARSTERS: Q And who was the bailiff?

A That was Mr. McCormack (sic).

Q Is that the only note and the only time you received a note?

A No, I asked for some clothes at one time and some other jurors was asking for clothes, and I asked Mr. McCormack—that is the first time, and I said, "Can I call my wife? I need some clothes," and he said, "The only way you can do it is write a note and let me censor it and I will see that she gets it."

Q Okay. And did you write a note?
[fol. 259] A Yes.
Q And did you get your clothes?
A Yes, I got my clothes, and this one juror, Bill McClune or McKeown or something, his wife sent a shirt along for him.
Q All right. Now, are those the only times that you received a note or wrote a note?
A Yes.
Q And this was prior to your deliberations?
A Let's see. I think I sent a note around about Friday for clothes, either Thursday or Friday, roughly, and on her birthday she told me Rex and Ray were taking her to dinner and to Lodge. That was on Wednesday.
Q Well, all I asked was, these note incidents were prior to the time that the case was actually given to you for your deliberations?
A Well, I think the last one—I am not positive, but it was her birthday, that she wrote me the note that she was going out that evening with friends of ours.
Q Well, you still aren't answering the question, Mr. Kolibaba. Do you—
A I am trying to think when it was. May the 3rd, I think.
Q Do you remember the incident of the Court giving you the case and sending the jury out to determine the guilt or innocence?
[fol. 260] A Oh, yes.
Q Well, during the time you were out did you write notes? How long were you out? How long was the jury out?
A I believe about 26 hours.
Q All right.
A But then I recall it now. Wednesday was her birthday and we got out Wednesday, so I received the note that afternoon, that she was going to be taken out to dinner and to Lodge.
Q And you got the case, the case was handed to you—
A Tuesday, I believe, if I remember. Yes, Tuesday we got the case.
THE COURT: So this note was handed to you while you were deliberating, that is, while the jury was meet-

ing for the purpose of reaching a verdict, is that what you are telling us?

A Yes, we just walked in there and I received the note.

THE COURT: Had you been instructed by the Court with respect to the law that you should apply to the case?

A Well, I asked him how we could contact anybody and he said to write a note and he has to censor it.

THE COURT: Yes, but now I am asking you this. When you sent this note out and you received the note, had you heard the arguments of the lawyers and the instructions of the Court, and were you in the act of deliberating as a jury?

[fol. 261] A Yes, we were.

THE COURT: You were?

A Yes.

THE COURT: All right.

MR. MARSTERS: Q Do you understand what we are talking about wasn't during the trial, while they were putting on evidence?

A No. I asked for clothes during the trial.

Q Okay. Now, prior to the time of your deliberations, did you ever hear any of the jurors discussing the guilt or innocence of Mr. Parker?

A No, I didn't.

Q Did you ever hear a juror use the words, similar at least, "guilty as hell"?

A No, I didn't.

THE COURT: Did you ever hear any such expression as that after you had retired for the purpose of deliberating on the case, when you were discussing it?

A No.

THE COURT: After you had started to deliberate, that is, you had heard the arguments of the lawyers and you had heard the instructions of the Court and you retired for the purpose of reaching your verdict, was the jury ever separated at any time after that?

A They were all together.

[fol. 262] THE COURT: During those full 26 hours?

A Yes.

THE COURT: You were never permitted to separate as a jury, some of you went one place and some another?

A Oh, no. Then we were kept in our rooms real close. They wouldn't let us go no place.

MR. MARSTERS: Thank you. That's all I have.

CROSS EXAMINATION

BY MR. HALEY:

Q Mr. Kolibaba, did you go to church on Sunday?

A Yes.

Q And who did you go with?

A I went with that little lady there (indicating).

Q Mrs. Gattman?

A Yes, and Bill McClune—I believe his name is McClune—and Mr. Morrison. I believe that's him back there (pointing). I am not sure, but I believe it is, and we were escorted by the lady back there, that bailiff (pointing).

Q One of the bailiffs?

A And a sheriff's car picked us up in front of the hotel.

Q And you went downtown to a chapel?

A Someplace down there.

Q Fourth and Burnside, Fifth and Burnside, would that be about it?

[fol. 263] A No, not Burnside. It's up this way someplace (indicating south).

Q Is that a Catholic Church?

A Yes.

Q Is it St. Vincent de Paul, do you remember?

A Well, I don't remember the name of it. My parish isn't here. It's out on 52nd.

Q But it was a downtown parish, is that right?

A Yes, Catholic Church.

Q And do you know who stayed behind that time or where they were?

A No, I don't.

Q And whether they were kept together and a bailiff with them?

A No, I didn't know.

Q Did you observe from time to time yourself—you have no knowledge, do you, whether Mr. Cormack ever

talked to any of the jurors about Mr. Parker, or not, do you?

A Not to my recollection.

Q You don't know one way or the other, do you?

A No, I don't.

Q And what can you tell us about the bus trip out to Vernonia? Do you remember?

A Well, I know we had a pretty rough ride and it was dirty and dusty, because I noticed the dust coming [fol. 264] through the bus, and I was on the one that had some motor trouble, and they were Greyline buses, I believe.

Q Yes. Was that the one second behind?

A Pardon me?

Q Was that the second bus?

A No, I was in the front one, with the motor trouble.

Q And did the Judge ride with you?

A I don't remember that.

Q Do you remember who did ride with you?

A Well, I remember just Bill, is the only one.

Q Bill McKeown?

A Yes.

Q That's the only one you remember being on the bus with you?

A Yes.

Q Did you get any phone calls, did Mr. Cormack convey any phone calls or messages to you?

A No, he did not. I got a note from my wife.

Q Yes, but I mean aside from the notes you got, how about phone calls?

A No.

Q When is your wife's birthday, May 3rd?

A Yes.

Q And you got the note on your wife's birthday?

A Yes.

[fol. 265] Q And that was the day of the—when you reached the verdict, after—at the end of that day is when you reached your verdict?

A Yes, that's the same day.

Q You stated that everyone knew it was your wife's birthday. Did you pass the card around and show it to people, or what did you do?

A It wasn't a card, really. It was a note.

Q Just a note. Did the other jurors see it and jolly you about it, and so forth?

A Well, everybody knew it was my wife's birthday and they were—some people said something about it, I wouldn't know who, but they did.

Q But some of them recognized you had the note?

A Oh, yes.

Q To your recollection did most of them know you had the note?

A Oh, that I don't know.

Q Could you specifically say that those, of your knowledge, that you can say knew you got the note?

A Well, I imagine most of them should have seen it passed to me. In fact, it was handed to me by the bailiff.

Q Yes. Could you tell us who, specifically, that you would know of your own knowledge would have seen Mr. Cormack pass the note to you?

[fol. 266] A Well, that I wouldn't know offhand.

Q They were all there—

A Oh, yes, they were all there.

Q —to see and observe? Yes.

Did any of them talk to you about the note, I mean just jolly you along about it? Did anybody make a comment about it, anyone that you remember?

A No, I really don't.

Q Do you recall on the jury view whether or not the court reporter was out there?

A Where?

Q Out at Vernonia when you went out.

A No. It was kind of strange, everything, so I looked around a little bit to see what was going on.

Q You don't remember whether a court reporter was there?

A No.

MR. HALEY: That's all I have.

THE COURT: Anything further from this witness?

MR. MARSTERS: No, your honor.

* * * *

[fol. 267] EDWARD C. MILLER was thereupon produced as a witness in behalf of the Defendant, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MARSTERS:

Q Mr. Miller, you were one of the jurors in the Parker case, is that right?

A Yes, sir.

Q And would you tell the Court, please, whether or not you received a letter from Mr. Parker?

A No, I did not.

Q All right. Will you tell the Court, please, whether or not at any time during your deliberations you heard Mr. Cormack discuss the case with any juror?

A No, I did not.

Q Will you tell the Court, please, whether or not at any time that you observed, that any of the jurors were not in the company of a bailiff?

A Not that I know of.

Q Did you see Mr. Cormack pass a note to Mr. Kolibaba?

A No, sir, I did not.

Q So you knew nothing about it?

A I know nothing about that at all.

Q All right.

And will you state, please, whether or not you ever [fol. 268] heard any of the jurors, prior to the time of deliberation, discuss the case by using the words, "He's guilty as hell," or words of like purport?

A No, sir.

Q Did you ever hear such remarks in the jury room after the case was given to you for your deliberations?

A I never heard any such remark, no, sir.

MR. MARSTERS: Cross-examine.

CROSS EXAMINATION

BY MR. HALEY:

Q Mr. Miller, how old are you, sir?

A My age?

Q Yes.
A Eighty-two.
Q During the trial what was your health?
A Very good.
Q Did you go on the walks with the other group?
A No, I did not.
Q You remained behind. And was a bailiff in attendance on you?
A Yes, as I remember, in the hotel.
Q Who was the bailiff?
A The lady.
Q Do you remember her name?
[fol. 269] A I don't remember her name. She is sitting back there (indicating).
Q She stayed with you there all the time?
A Well, she was in the lobby, I know.
Q She was in the lobby?
A She might have been in my room part of the time, I don't remember, but I didn't—
Q Well,—
A Pardon me?
Q Go ahead.
A I didn't take the walk, I remember that.
Q So part of the time the bailiff was with you and part of the time she wasn't?
A Well, possibly, yes; I don't remember.
Q Did you go to the show with the others?
A Yes, I did.
Q And how many of you went to the show?
A I think all of us attended the show.
Q Did all of the bailiffs go.
A Well, I believe two of them did.
Q And of your own knowledge you don't remember whether Mr. Cormack made any comments to the jurors or—at any time, or not, do you?
A I don't know of any, no, sir.
Q He might have or he might not have, as far as you [fol. 270] know, is that right?
A Well, it's possible. I can't say. I don't know.
Q That's right; and as far as passing notes goes, you don't know whether he passed notes or not, do you?

A No, sir, I do not.

Q Did you come to know Mr. Kolibaba over a period of time?

A Mr. who?

Q Mr. Kolibaba, the man that just testified.

A No, I just met him and that is all. I never knew him before that.

Q But I mean you got to know him during the time of the trial, didn't you?

A Oh, yes. We all got acquainted.

Q Yes. Did you get along well with him?

A Well, I hope so.

Q He never did anything or said anything that would make you disbelieve him under oath, did he?

A No, sir.

Q So when he says he got a note and that others could have seen the note, they were in a position to and they might have seen it, you would believe him?

A I would believe him, yes, sir. I have no reason not to.

Q That's right.

Do you remember the bus trip out to Vernonia?

A Yes, sir.

[fol. 271] And which bus did you go on, or was there one or two?

A Well, I was on the one that had so much trouble.

Q Everybody was on that one. (Laughter)

Well, anyway, you were out of the dust?

A Yes, that's right.

Q Did the Judge go with you?

A No, sir, I don't think so. I think the Judge was in a separate car, if I remember right.

Q The Judge was in a separate car.

Do you remember whether the court reporter was out there at the trial (sic) or not—at Vernonia?

A No, sir, I don't know. I don't know.

MR. HALEY: I have no further questions. Thank you.

MR. MARSTERS: I have no further questions.

• • • •

[fol. 272] EARLE F. KIDDER was thereupon produced as a witness in behalf of the Defendant, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MARSTERS:

Q Mr. Kidder, you were one of the jurors in the Parker case?

A Yes.

Q And would you tell the Court, please, whether or not you received a letter from Mr. Parker?

A I did.

Q Pardon?

A I did.

Q All right. And will you tell the Court, please, whether or not you ever heard Mr. Cormack talking to any of the jurors about the Parker case?

A I did not.

Q Were you along on some of these walks and to the show and so on?

A I think most of them.

Q Yes. Was there ever any time when you were not in the company of a bailiff?

A No.

Q Did you see Mr. Cormack deliver a note to Mr. Kolibaba?

A No.

[fol. 273] Q Would you state, please, whether or not you ever heard any of the jurors discuss in the jury room prior to the time the case was submitted to them for their deliberations, any expression of guilt or innocence of Mr. Parker?

A No.

Q Did you ever hear such language used, such as "guilty as hell," or words of the purport?

A No.

MR. MARSTERS: You may cross-examine.

CROSS EXAMINATION

BY MR. HALEY:

Q Mr. Kidder, do you recall the incident of Mr. Kolibaba's wife's birthday?
A No.
Q Did you hear Mr. Kolibaba's testimony?
A I did.
Q Did you come to know him over the term of the trial?. Did you get to know him?
A I didn't hear—I didn't understand that.
Q Did you get to know Mr. Kolibaba over the time of the trial?
A Oh, yes; yes.
Q And did you have any difficulty with him?
A No.
[fol. 274] Q Did he ever do anything to indicate to you that he was—couldn't be believed under oath?
A No.
Q So that when he testifies that he received a note from Mr. Cormack, you believe him, don't you?
A That's right.
Q And as to whether or not any of the—whether Mr. Cormack ever made any statements to any of the jurors at any time, you have no knowledge one way or the other, do you?
A I didn't hear anything of the kind.
Q So you have no testimony on that whatsoever, do you?
A No.
Q How about the bus trips?
A There were two buses, one not so good as the other.
Q Which bus did you ride in?
A In the one that wasn't quite so good.
Q You were in the one that absorbed the fumes?
A I was in the one that blew out all the smoke.
Q You were in the front bus?
A No, we were in the rear bus.
Q The rear bus. And did the Judge ride with you?
A Sir?
Q Did the Judge ride with you?

MR. PARKER: He can't hear you.

[fol. 275] MR. HALEY: Q Do you have a hard time hearing me?

A Yes, I do.

Q Is your hearing not as good as it might be?

A Not as good as it used to be, of course.

Q How long has it been this way?

A Oh, about two years.

Q About two years. How was it at the time of the trial, about the same as it is now?

A I had no trouble hearing.

Q You had no trouble hearing then?

A No, the testimony.

Q But you do now?

A That's right.

Q Was the Judge with you in the bus?

A I don't know.

Q He could have been, is that right?

A It's possible.

Q You don't remember who was with you on the bus?

A Mr. Miller, and outside of him I can't say. He was my room juror, and naturally I——

Q Just you and Mr. Miller there?

A Oh, there were several others.

Q Can you name them?

A No.

Q Were they men or women?

[fol. 276] A They may have been both, I can't say positively. I know there were men in the bus but whether there were women in that bus or not, I don't know.

Q Did you observe Mr. Parker being conveyed out there to Vernonia?

A No, no.

Q Did he ride in the bus with you?

A Not to my knowledge.

Q Well, then, on walks, you were one that stayed behind, weren't you?

A No.

Q Oh, you went on the walks at all times?

A That's correct.

Q I see. So Mr. Arnold's testimony that you were one that stayed behind was inaccurate, is that correct?

A My recollection of Mr. Arnold's testimony is that he said probably I was the one.

Q That wasn't correct, was it?

A That wasn't correct.

Q Did you go to the show with them too?

A Sir?

Q Did you go to the show with them too?

A Yes.

Q And how many of them went to the show?

A As far as I can recall, all of them.

[fol. 277] Q All right. Who stayed behing when you went on walks?

A To my knowledge, Mr. Miller was one of them.

Q That's the only one of them?

A The only one that I know of.

Q And you recollect quite accurately as to being at the show, that all of them were there?

A I think they were all there. I am not positive whether they were all there or not.

Q And you think on the walks they were all there except Mr. Miller?

A As far as I know.

Q Yes. Did you go to church with the others?

A No.

Q Which ones went to church?

A To my knowledge, Mr. Miller. Outside of that I don't know.

Q Mr. Miller went to church?

A Mr. Miller.

Q Yes. Where did he go to church?

A I don't know. I didn't ask him.

Q Did a bailiff go with him?

A That I can't answer. I don't know.

Q Well, then, as far as the material portions of this as to whether or not Mr. Cormack said anything to the jury or passed any notes, you have no evidence one way or [fol. 278] the other on that at all, do you?

A I do not remember hearing him or seeing him.

Q Well, you have no evidence, then, to offer on that?
A No. No.
MR. MARSTERS: Well, I object to that, your Honor, and move it be stricken.
THE COURT: Well, he has already answered the question.
Anything further?
MR. MARSTERS: No, your Honor.

* * * *

[fol. 279] FLO V. BLOMQUIST was thereupon produced as a witness in behalf of the Defendant, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MARSTERS:

Q You are Mrs. Blomquist?
A Yes.
Q And you were one of the bailiffs during the Parker trial?
A That's right.
Q Prior to the Parker trial had you served as a bailiff before?
A I have been on practically all murder trials since 1948.
Q Is that rather a special assignment?
A Yes, uh-huh.
Q And now, as a bailiff, would you state, please, whether or not at any time during the trial that, as far as you know, there was any occasion when any of the jurors were not in the company of a bailiff?
A They were not—they were always in the company of a bailiff, one bailiff at least.—You mean when they were out?
Q Yes, I am just saying, was there any time when they were not in the company of a bailiff?
A Not to my knowledge, they were not.
Q Now, specifically, what was your function? Did you [fol. 280] accompany—

A I had charge of the women, the girls on the 6th floor, and there were six of them, and the other two bailiffs had the men on the—I think 7th and 8th floors of the hotel.

Q Which hotel was this?

A The New Heathman.

Q And now, for the record, Mrs. Blomquist, after the jury was selected they were housed at the New Heathman Hotel?

A That's right.

Q And then would it be proper to say, and if it isn't you correct me, I am just trying to get at the generalities here,—would they be returned to the hotel during the noon hour?

A No—well, yes, because we would go up there to eat lunch and the most of them would want to go up to their room for a few minutes before we came back, and it was usually the practice to go up to their room after they ate lunch.

Q And after you came back to court and the court took up, then at recess you stayed here in the courthouse?

A Oh, yes, we always stayed here.

Q And after the afternoon session had recessed you would take the jurors, then, back to the hotel?

A Back to the hotel, and have dinner and then some of them would—they would all go to their rooms and some of them later would want to take a walk, some of the men.

[fol. 281] Q Now, for the record, please, would you tell us what provisions are made so that you can check on the ladies that they are in their room and not being contacted by outsiders, and so forth?

A I kept track of them all the time. They were right close to my room, and when we went up and down the elevators I went around and we all went together, up in the elevators and down. I kept them—that's the usual procedure, as a bailiff.

Q Did you have a complete floor, or a section?

A We had—no, we didn't have a complete floor. We had each—there was six women, and each one of them was two in a room, and I had a room by myself, but they were right close to mine and I kept contact of them.

Q All right. Now, did you accompany the jurors on these walks?

A I did, all except one. The Sunday afternoon after we took one walk we came back and had dinner and a little later some of them wanted to take a walk down to the river, and a lot of them didn't, so finally Mr. Kendall took, I imagine—I didn't count them, I imagine about five or six of them, maybe seven, down to the river, and I stayed at the hotel with the rest of them.

Q I see. Would that be both men and women?

A Men and women.

[fol. 282] Q That you stayed with back at the hotel.

A Yes.

THE COURT: Where was Mr. Cormack during that period of time?

A He was off that day. He went to church, I believe and then went home.

MR. MARSTERS: Q Was that the only time he was off, to your knowledge?

A There was one other time in the evening he went to the auditorium to some program, or something, at the auditorium, and he left for a while. He left as soon as he got through dinner. That was the only other time.

Q Who was in charge of the bailiffs?

A Mr. Kendall and—Mr. Cormack and Mr. Kendall and myself.

Q I said, who was in charge of the bailiffs?

A Oh. Well, no one.

Q You weren't the boss?

A No. Well, I imagine Mr. Cormack was, because he was Judge Oppenheimer's regular bailiff. However, I had been on so many trials and knew the procedure and they hadn't, why I did try to give a little advice, once in a while, what's supposed to be done and what shouldn't.

Q All right. Now, would you state, please, whether or not at any time during this trial that you ever heard Mr. [fol. 283] Cormack discussing the merits of this case with any juror?

A I did not. As a rule when we walked up and down the street to dinner one bailiff would walk ahead and the other one in the rear to see that no one talked to them or

came in contact with them in any way, and he usually walked ahead. I usually walked towards the rear to watch them, so I never heard anything he said.

Q Were you present and did you observe Mr. Cormack give a note to Mr. Kolibaba?

A No, I did not.

Q You know nothing about it?

A Nothing about that.

Q Would you please tell the Court whether or not at any time in your presence, as a bailiff, you ever heard any of the jurors discuss the merits of the Parker case?

A They did not. If they ever even hinted at anything I told them not to discuss it and I refused to even let them discuss anything in my presence at all, and I told them not to discuss it; that was the rule.

THE COURT: Do you know of any time when any of the jurors attempted to discuss any issue?

A No, I do not, not in my presence or when we were walking back and forth, they never did.

THE COURT: You had no occasion to admonish them at any time?

[fol. 284] A No.

MR. MARSTERS: You may cross-examine.

CROSS EXAMINATION

BY MR. HALEY:

Q Mrs. Blomquist?

A Yes.

Q You said that as a rule when you walked up to dinner and so forth that you followed this pattern; that was generally you did that, is that right?

A That's right.

Q You didn't in every instance, but usually you did?

A Usually, in most instances.

Q Yes. Some of the time you didn't but most of the time you did?

A I think practically every time I did.

Q Practically all the time?

A Practically all the time.

Q Not all of the time, but most of the time?

A I would say most of the time.

Q But not all of the time?

A If it happened to be that one of the men bailiffs was behind, I would go ahead, but as a rule he would go ahead and I was toward the rear.

Q But the general idea was that you all walked up in [fol. 285] a body, is that right?

A Yes, all stayed together.

Q All stayed together.

Now, you stated that you gave advice to Mr. Cormack as to what should and shouldn't be done because you were more familiar with it than he?

A That's right.

Q And what advice did you give him that should be done?

A Well, I just—in regard to some times they would want to go by themselves up and down the elevators. I think I mentioned once that they weren't supposed to ride by themselves. He wasn't familiar with the procedure, and two or three times if I would see anything that I didn't think they should do, I mentioned it to him. I don't—(pausing)

Q Well, now, you observed this, and quite properly told Mr. Cormack about it, didn't you?

A I did.

Q And after that did Mr. Cormack keep them from riding separately up and down in the elevator?

A Well, he tried to but—it was—there were two floors and it was rather hard to keep track of the men on the two floors, but I don't know whether any of them did or not. I say that because I had charge of the women and I didn't keep track of the men, so much, what was going on.

[fol. 286] Q But you did observe the trouble he was having in this regard and you pointed it out to him and straightened him around?

A Yes.

Q And you thought this was important?

A I did.

Q And what other advice did you give to him?

A Well, I don't remember just exactly. I remember when we were eating dinner once, and I don't remember, something went on and I told him then, I mentioned to

him that they shouldn't—something they shouldn't do. It was at the dinner table. I can't remember just what it was, but it wasn't anything that was important, that was really imporant, but I did—

Q Was all the jury present at that time?

A All of them. The jury ate at one table and the two bailiffs and myself ate at another table right alongside, and watched everything they did and saw that no one talked to them.

MR. HALEY: Oh, Mr. Miller,—I would want him to stay, if I might. I mean I have no objection to him going out right now, but we would want to call him again.

THE COURT: Do you want to call him again?

MR. HALEY: Yes, but not right at this moment, sir.

MR. MILLER: Okay.

[fol. 287] THE COURT: Now, let's get that straight. Do you want to call him in rebuttal?

MR. HALEY: Pardon?

THE COURT: You had an opportunity to cross-examine Mr. Miller. Were you through?

MR. HALEY: Well, I got some evidence—the only thing I am going to ask about is going to church. I didn't realize when I examined him and the evidence came out afterward, that he was the one that went to church, and I just want to confirm it.

THE COURT: Very well.

MR. HALEY: Q Now, see if you can search your recollection as to what it was that you felt was wrong that happened there at dinner that you told Mr. Cormack about.

A No, I don't remember whether it was—I think that it was one of the waitresses said something and made some remark to one of the jurors, or something, and I mentioned to him that they weren't supposed to talk to the jurors except just to get their order. It wasn't anything really important, excepting that I thought at the time it shouldn't have been—that they shouldn't—

Q Do you recall what was said?

A No, I don't. It was just that I saw the waitress making a remark to one of them and I didn't see—didn't hear what she said, and I don't know that she was even

[fol. 288] talking about the trial or anything. I don't think she was.

Q But you don't know of your own knowledge, do you?

A No.

Q And you know of your own knowledge that this is something that you must prohibit, isn't that correct?

A That's right.

Q And yet this actually happened—

A That's right.

Q —without any intention on your part, isn't that right?

A That's right.

Q And whether or not there was anything said that was prejudicial or not, you don't know?

A I don't know. I don't think it was, but I don't know.

Q But you don't know yourself, do you?

A No.

Q Now, what other things were there that you advised Mr. Cormack on?

A Well, I don't remember of anything—anything special at all, but I—

Q Well, you advised him on things that shouldn't be done. You advised him on things that should be done. What did you advise him shouldn't be done?

A Well, I told him they shouldn't ride up and down on the elevators by themselves because that was the standard [fol. 289] procedure we had always done at all trials.

Q And talk to the waitresses—third persons; and what else?

A I don't know offhand of anything else at all.

Q Were there any other things that you have forgotten?

A No, I don't think so.

Q These were the two things that you saw and observed?

A Yes.

Q Now, as far as the jurors go, if they attempted to talk about this thing you told them not to, didn't you?

A I did.

Q And how many occasions did they attempt to do this?

A Well, they didn't attempt at any time that I know of. As I said, if I thought they were going to say something I either changed the subject—I usually walked along with the girls,—if they even between themselves started to say something, if I even thought they were going to, I would either change the subject or ask them not to discuss anything about the case at all.

Q You were one of the stricter bailiffs in this regard, weren't you?

A I always have been.

Q Good. And you walked along with the girls on the jury and kept the conversation as it should be?

A Absolutely.

[fol. 290] Q And the other bailiffs followed your example, I assume, and you suggested when they walked with them they didn't say anything to them?

A I didn't—as I said, I was at the rear and of course there were people passing by all the time on the sides, but I watched to see that nobody talked to them or spoke to them in any way.

Q Well, you being one of the stricter bailiffs, and you walked along with the girls, chatted with them, and Mr. Cormack, I assume he was with the men, is that right?

A Well, as a rule. He was up ahead as a rule, up in front, and I don't know who he walked with or talked to.

And Mr. Kendall was walking—

A Mr. Kendall was there too. He was walking, too, all the time, between.

Q On Sunday did you go to church?

A Yes, I got up at five o'clock and I took one woman and three men to mass at six.

Q Where was that?

A It was at Fourth street and I am not sure—it was up beyond Jefferson Street, but it was on the corner of Fourth and either College or one of the streets up that way. Now, I am not positive what street it was, but it was a Catholic Church, and the deputy sheriff came up to the hotel and picked us up and took us down there, then [fol. 291] he came and got us and took us back to the hotel.

Q Oh, you mean the church was south, not north, it was south of the courthouse?

A It was south of the courthouse, up on Jefferson Street.

Q Was that St. Lawrence, the wooden church?

A I don't know the name of it. I wasn't familiar with the church. They told me where it was and I told the deputy sheriff and he knew where it was and he took us there, but I never—I have been there before with other jurys. I have always taken three or four at practically ever trial.

Q And you went with them?

A I went with them.

Q Did you go to mass with them?

A I went to mass with them and sat right with them.

Q And this was on Sunday morning?

A Sunday morning.

Q What mass did they go to?

A Six o'clock in the morning.

Q Who else went to church that day?

A Well, "Who else"—do you mean in the four?

Q Well, what jurors, who went?

A Well, there was Mrs. Gattman, Mr. Miller, and I think this other—there was two others. I would know them if I saw them but I don't remember their names.

Q These are the ones that went with you at six o'clock?

[fol. 292] A Yes, at six o'clock in the morning.

Q And did any others go to the services that day?

A No.

Q Nobody else went to church?

A No, nobody went of this jury at all.

Q And how about the bailiffs?

A Well, excepting Mr. Cormack. I think that's what he did, I think he went to church and then he went home for the afternoon. That was on Sunday.

Q And who did he leave in charge of the men then?

A Mr. Kendall.

Q Mr. Kendall; and on the occasion when he left to go to the auditorium at night, did he tell you he was leaving?

A He told us, sure, that he was leaving, and Mr. Kendall and myself were with the jurors.

Q Mr. Kendall was left in charge of the men jurors?

A That's right.

Q Were you present when Mr. Kendall was sworn in?
A No, I was not. I don't know when he was sworn in. I didn't—
Q When were you sworn in?
A Harold Graham swore me in. He usually always did, except once in a while the judge would, but usually Harold Graham, in the morning before the trial started.
Q And after the trial started were you present at all [fol. 293] times?
A At all times, never left. I never left the jury, never left the courtroom at any time.
Q So you would know, then, whether or not something had or had not happened as far as the trial went, because you were there?
A That's right.
Q And you don't remember Mr. Kendall being sworn in in the presence of the defendant, do you?
A No, I don't excepting, of course, we were sworn in before the trial was given to the jury and—all three of us were sworn in at that time.
Q But as far as being sworn in as a bailiff in the presence of the defendant, Mr. Parker, here, and a court reporter present, that didn't happen to Mr. Kendall, did it?
A No, I didn't see him sworn in.
Q And you were present at all times before the trial, weren't you?
A Yes, but if he was sworn in it was early in the morning, before I got here or while I was somewhere else. I didn't see it.
Q But the point is he was not sworn in at the trial, was he?
THE COURT: I think she has answered.
MR. MARSTERS: If it please the Court, I don't know [fol. 294] what this has to do with this case.
THE COURT: I think she has answered that question.
A Not to my knowledge. I didn't see it.
MR. HALEY: Q Can you tell us about the incident of the open door?
A Yes. When we came in from breakfast at nine-thirty in the morning—before nine-thirty, Mr. Cormack was leading and he opened—unlocked the outside door

into the hall, and then he went on through and unlocked the door into the courtroom from the jurors' side. He always kept it locked, and he went in and unlocked it, and while he went ahead and did that, the jury was filing in and he left the door open, naturally, for them to go through. Well, when they went through they didn't shut it behind them and he went through and then went right on back, and in the meantime one of the lawyers, I suppose, saw it open and they came in and said something about it.

Mr. Cormack, of course, went right back out after he heard about the door, and shut it and locked it again, and at noon the same day, at two o'clock or about two o'clock when we came back from dinner, Mr. Kendall was in the lead and he went and unlocked the door and the jury went in and then he followed them in. I don't know what he was going in for or what he was talking about or what he said. I went into the courtroom, but someone came in, Mr. Parker or someone, and said that [fol. 295] that door was open again, and I rushed right out, and as I came out Mr. Kendall came out the door and locked it behind him.

Now, I don't know what he went in for because I was in the courtroom. I watched the jury go in and then I came in the courtroom and I didn't know what he went in for. I had no idea.

Q When one of the attorneys brought it to your attention that the door was open, did you go out and inspect it?

A That's right, I went right out.

Q Were there witnesses in the hall there?

A I don't know who there were. There were people standing around.

Q There were witnesses around there talking?

A I don't know who they were. There was always someone out there talking.

Q Now, on the walks you stayed behind with those that stayed behind, is that correct?

A No,—which walk are you referring to?

Q How many walks were there?

A Well, we went—on Sunday afternoon they wanted to take a walk and so they contacted me and said some

of the men and some of the women wanted to take a walk, and so I went around to all of the women and they all wanted to go excepting one, Mrs. Gattman, and she [fol. 296] had shampooed her hair and she said she would like to stay, and I said, "No, that's against the rules. You either have to go or we all stay." I said, "The jury has to be kept together and if they don't all go they all stay," so she said she would go, and she got ready and we went down in the elevator, downstairs, and when we went down and got on the street, Mr. Kendall was there with some of the men jurors, and I didn't count them but I would say that there was either two or three wasn't there. They was, I think, five or six—there was eight men, and I would say there was either five or six there and I said to Mr. Kendall, "Where's the other jurors?" He said, "They don't want to go. They are up in their room." I said, "You know the rules. The jury has to be all kept together or they all stay."

Well, he got quite put out about it and we stood there quite awhile arguing—I would say arguing, or discussing, back and forth, that they either had to all go or all stay, and finally he said, "I will be responsible for them." And I hesitated quite a little while whether to go or whether to stay, refuse to go, and so finally I turned and went. He said he would be responsible for them, and so I went, and Mr. Kendall and myself went and we were gone, probably, an hour and a half.

THE COURT: Did you ever call this matter to the Judge's attention?

[fol. 297] A No, I didn't.

THE COURT: You didn't think it was necessary?

A And he said—when he said he was responsible there was no way he could be responsible for them, as far as that is concerned, but I thought, "Well, it's not my"—I had all the women there, which I had jurisdiction over the women, and if he refused to have the men go there was nothing—and the rest all wanted to go, and so I finally gave in, very reluctantly, and went.

THE COURT: Where was Mr. Cormack that day?

A That was the Sunday he went home.

THE COURT: He wasn't there?

A No.

We were gone about an hour and a half and came back and had dinner.

MR. HALEY: Q At the time of the show—

Let me ask you one question. As far as the women were concerned, you took all the women with you, didn't you?

A Yes, all the women went.

Q The women always went all together, didn't they?

A Pardon me?

Q The women always went all together, didn't they?

A They all went together.

Q There wasn't a time when a woman stayed behind, was there?

[fol. 298] A No, not at any time.

Q Now, on the show, did you go to the show with them too?

A I did, and they was every one present and all three bailiffs at the show.

Q The whole group went to the show?

A That's right.

Q What was the show?

A Fred MacMurray in "The Absent Minded Professor," and then there was a travelogue.

THE COURT: Did you discuss with Judge Oppenheimer the propriety of taking the jury to a movie?

A Yes, we always did. We had—

THE COURT: I didn't ask you that.

A Oh, excuse me.

THE COURT: Did you ask Judge Oppenheimer whether he approved taking the jury to the—

A Oh, yes, he gave permission to take them.

THE COURT: Did you personally request permission?

A Mr. Cormack did.

THE COURT: What did he tell you?

A He said, "That's perfectly all right."

It was always the custom to entertain the jury on Saturday or Sunday, and we either took them for a bus ride and to a show—or to a show. That was customary on all trials.

[fol. 299] THE COURT: But you were advised by Mr. Cormack that he had received permission from Judge Oppenheimer to go?

A That is true. He had permission from Judge Oppenheimer to go.

MR. HALEY: Q Who selected the show?

A Well, all of the jurors wanted to go to a show and some wanted to see that and some didn't care, so we went to that show.

Q In other words, it was left to the jury what show to see?

A Well, I guess they all wanted to see that and the rest didn't care, so we went to that show.

Q The Judge didn't make the determination what show they would see, did he?

A No, absolutely not, he left it to the bailiffs and the jury.

Q Now, on the note-passing situation, you yourself did not pass any notes, did you?

A I absolutely did not.

Q And not only that, you wouldn't have passed any note, would you?

A I wouldn't pass any note.

Q And that is because you are an experienced bailiff and you know better, don't you?

A I know better.

[fol. 300] Q Do you, of your own knowledge, know that Mr. Cormack passed these notes to the jury?

A No, I don't. I didn't see it. I don't know.

Q So you have no knowledge, you don't know, he may have or may not?

A That's right.

Q And of your own knowledge you don't know whether Mr. Cormack talked to any of the jurors about the guilt or innocence of Mr. Parker?

A I do not. I never heard him mention it.

Q He might have and might not?

A That's right.

MR. HALEY: I have no further questions.

MR. MARSTERS: I have nothing more.

* * * *

[fol. 301] THE COURT: I would like to ask—how do you pronounce that, "Kolibaba"?

(GEORGE V. KOLIBABA, previously sworn, answering from back of courtroom.)

A Kolibaba.

THE COURT: Mr. Kolibaba, will you stand?

I think the Court would like to ask you a question I neglected to when you were on the stand.

Now, you are the juror who received the note from your wife that Mr. Cormack gave you, is that right?

[fol. 302] A Yes.

THE COURT: Now, in reaching your decision, the decision which you made in this case, did you base your decision solely and exclusively upon the evidence which you heard during the trial, and the instructions of the Court?

MR. HALEY: If the Court please—

THE COURT: Do you want an exception to that question?

MR. HALEY: Yes.

THE COURT: I will allow you an exception.

MR. HALEY: This will be along the exception I have—

THE COURT: You may have it. I want him to answer the question.

A Do you mean in the courtroom?

THE COURT: Let me ask you again. Did you base your decision solely and exclusively upon the sworn testimony you heard during the trial of the case, and the instructions which the Court gave you?

A Yes.

THE COURT: All right.

I will permit any other questions to this witness. Mr. Parker, do you want to ask any questions?

MR. PARKER: No.

THE COURT: Fine.

MR. HALEY: Now, we have a disagreement here. We understand it is possible Mr. Kolibaba answered that [fol. 303] he was influenced by—

THE COURT: Well, I didn't understand it that way.

MR. HALEY: I didn't either.

Let me say this. That this is an area, although I am asking, I have been consulting Mr. Parker,—this is something I wouldn't go into, so I want to exclude this from the Court's consideration when we get around to it. This is one of those areas which I am reserving for my own prerogative instead of Mr. Parker's, see?

THE COURT: Now, I don't quite follow you.

MR. HALEY: Well, the Court gave me leave to state to the Court at any time when Mr. Parker asked a question or examined, or stated a proposition which I did not want on the record, I would call it to the Court's attention. Now, this is one of those occasions.

THE COURT: Now, Mr. Parker hasn't said anything.

MR. HALEY: Well, through me he is.

I will let Mr. Parker.

THE COURT: All right, Mr. Parker.

MR. PARKER: And I am saying this is one of those occasions when I don't want it to influence the Court.

THE COURT: And you feel Mr. Haley shouldn't be asking this question?

MR. PARKER: Yes, I want to go into this myself.

THE COURT: Mr. Parker, do you want to go into this?

[fol. 304] MR. PARKER: Yes, your Honor. I would like to ask the court reporter to read your Honor's question and answer back. I didn't understand it as Mr. Haley did.

THE COURT: I think that is a fair question.

Will you read the last question the Court put to the witness?

(The requested question was read, as follows:

"Let me ask you again. Did you base your decision solely and exclusively upon the sworn testimony you heard during the trial of the case, and the instructions which the Court gave you?

A Yes.")

THE COURT: Now, Mr. Parker, do you desire to pursue this further or ask this witness any further questions? The Court will permit you to do this.

MR. PARKER: There is only one question.

Mr. Kolibaba, you testified that on May the 3rd, 1961, your wife's birthday, you was given a letter by Mr. Cormack. Is that correct?

A No, it was a note.

MR. PARKER: A note?

A Yes.

MR. PARKER: Did you testify to that as a fact as it happened, or upon the evidence as you have heard it while [fol. 305] sitting in this courtroom?

A No, that happened.

MR. PARKER: That's all I want, your Honor.

* * * *

[fol. 306] TODD W. INMAN was thereupon produced as a witness in behalf of the Defendant, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MARSTERS:

Q Mr. Inman, you were one of the alternate jurors?

A That's right.

Q And, of course, you didn't sit on the deliberations but you did listen to the entire trial otherwise?

A That's right.

Q And you were kept with the other jurors during that time, up until the time of deliberation?

A I was.

Q Would you please tell the Court whether or not you ever overheard Mr. Cormack talking to any jurors about the case?

A I did not.

Q And did you know of any incidents, yourself, of your own knowledge, of any of the jurors being left alone, not in the company of a bailiff?

A No. The only way I can answer that is I stayed from a walk one day and the bailiff put me in the room and shut the door and I went and laid down on the bed and I went asleep, and when I woke up he was coming out of his room right next to us—right next to us.

Q Did you observe Mr. Cormack pass a note to Mr. Kolibaba?

[fol. 307] A Nope.

Q And during the time you were locked up with the jurors, or at any time in your presence while you were there in attendance, did you ever hear any of the jurors speak in any way about the case?

A I did not.

Q Anything about the guilt or innocence of the defendant, Mr. Parker?

A I did not.

Q Did you ever hear any such words used like "guilty as hell"?

A No.

MR. MARSTERS: You may cross-examine.

CROSS EXAMINATION

BY MR. HALEY:

Q Mr. Inman, of your own knowledge, then, you don't know whether Mr. Cormack talked to any of the jurors about the guilt or innocence of Mr. Parker, do you?

A I do not.

Q And you have no testimony to offer one way or another as to the note passing?

A No, I don't.

Q Do you recall the trip out to Vernonia?

A Yes.

[fol. 308] Q Which bus were you in, or was there just one bus?

A I was in the second bus.

Q There were two buses?

A That's right.

Q Did the Judge ride with you?

A I don't know.

Q Do you remember who did ride with you?

A No.

Q Was the court reporter out there?

A I don't know.

Q Did you take any walks with the group?

A Yes, some.

Q You took some walks with them?
A Yes.
Q And on some occasions you stayed home?
A Once.
Q And did you go to the show with them?
A No.
MR. HALEY: I have no further questions.
MR. MARSTERS: That's all.
MR. HALEY: Oh, yes, I do have one more question.
THE COURT: All right.
MR. HALEY: Q Who stayed with you when you stayed home from the show?
A Not Mr. Cormack, the other—
[fol. 309] Q Mr. Kendall?
A Yes, if that's his name.
Q Well now, both Mr. Kendall and the other bailiff, Mrs. Blomquist, have testified that all three bailiffs went to the show.
A Well, I don't know about the show. I didn't go to the show. One time I stayed at home and Mr. Kendall, whose room was right next to mine, put me in the room and shut the door. That's all I know.
Q So on the occasion you stayed home from the show you say there was a bailiff there?
A I don't know. I didn't even know about the show.
Q You don't know whether there was or wasn't, do you?
A No.
MR. HALEY: I have no further questions.
MR. MARSTERS: That's all, your Honor.

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[fol. 310] JAMES CORMACK was thereupon produced as a witness in behalf of the Defendant, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MARSTERS:

Q Mr. Cormack, you were one of the bailiffs that was in attendance on the jury during the Parker trial?
A Would you mind repeating that question, please?

Q Yes. You were one of the bailiffs that was in charge of the jury during the Parker trial?
A I was.
Q And for whom were you bailiff?
A Judge E. G. Oppenheimer.
Q And were you on regular assignment in his court?
A I was bailiff in his court for twelve and a half years.
Q And how long have you been a bailiff?
A Well, since June 29, 1951, until the end of February 1964.
Q That is this year?
A Of this year, yes.
Q Was the Parker trial the only murder trial that you ever acted as bailiff on?
A I—repeat that, please.
Q I am just asking you if that was the only murder case that you ever acted as a bailiff in, the Parker trial?
[fol. 311] A Well, I have had several criminal cases.
Q I was asking you about a murder trial. Did you have any other?
A No, we had one other, at least one. I can't recall it exactly now.
Q All right. Now, as to the bailiffs, were you in charge of the bailiffs?
A I was in charge of the bailiffs, with two assistants.
Q And they were Mr. Kendall and Mrs. Blomquist?
A Yes.
Q Now, as I understood from Mrs. Blomquist, and I don't care to repeat it in detail, but the jury was housed over at the New Heathman Hotel, is that correct?
A At the Old Heathman Hotel.
Q All right.
A Now the Park Haviland.
Q All right. And where were their rooms?
A They were on three different floors. When we came to reserve rooms they were pretty well filled by a group from Roseburg, but we were on three different floors, but there were three bailiffs.
Q And the ladies on one floor?
A Yes, in charge of Mrs. Blomquist.
Q And then the men were on other two floors?
A Two different floors, yes.

[fol. 312] Q Now, generally speaking, did you take charge of the jurors on one floor, or did you and Mr. Kendall alternate?

A Well, we alternated.

Q All right. Were the three floors one above the other or were there two—

A They were, I think, one above the other, in succession.

Q All right. Now, did you pass a note of some kind to Mr. Kolibaba?

A Yes, I did, and I knew what it was about. I think his wife was ill. I would never pass a note to anybody without seeing what was on it.

Q Did you observe what was on it?

A Yes, I observed it briefly and passed it on to the juror.

Q All right. Did you do that on more than one occasion or on one?

A I don't think I did but if I did at all I would know what was on it.

Q Well, do you remember a specific instance that you actually did give Mr. Kolibaba a note?

A Yes, I recall it.

Q Well, do you recall the date?

A Pardon me?

Q Do you recall the date or the time?

A The date? No, I don't remember. It's just a minor incident. It escaped my memory afterwards. I didn't [fol. 313] think about it until we had it brought up now in court.

Q All right. Now, did you, on occasion at least, accompany the jurors on walks and to the show and other things?

A On one occasion I recall, on the Sunday afternoon, after I had come from home, I had gone to church and gone home and come back and took a group out, about six or seven women, for a brief walk, along the river front.

Q Well, now, on that day that you were home, was that on a Sunday?

A It was a Sunday.

Q And was this after the case had been given to the jurors for their deliberations, or prior?

A It was prior.

Q All right. Were the jurors permitted to go on walks or anything after the case was given to them for their deliberation?

A No.

Q Was there any notes passed, to your knowledge, during the time when they were deliberating?

A Not to my knowledge.

Q Do you know approximately how long they were deliberating?

A Oh, part of two days, if I remember right.

Q All right.

A An afternoon, evening and a forenoon, that's my [fol. 314] recollection. I haven't checked up on it.

Q All right, sir.

Now, on the Sunday you say you went home,—is that correct?

A I went to church. Mr. Kendall and I arranged that he stay and I go to church, meet my family, drive home with them, came back, found there was a group out walking and another group wanted to go, and I took them, briefly.

Q Was there ever a time, to your knowledge, when a bailiff wasn't in charge of anybody at the hotel?

A No, sir.

Q Now, will you tell the Court, please, whether at any time you ever discussed the Parker case, the merits of the Parker case or anything about the Parker case with a single juror, alternate or regular?

A I don't recall it.

Q Well, did you or did you not?

A I did not because I can't recall it and I can't imagine myself doing such a thing.

Q Well, we are not interested in what you can imagine. We are interested in whether or not you did or did not.

A I did not.

Q All right.

THE COURT: Now, Mr. Cormack, you were here yesterday and heard Mrs. Gattman when she was here, the juror.

[fol. 315] A Yes.

THE COURT: She says that you told her, in the middle of the trial, "Oh, that wicked fellow, he is guilty." Did you ever make any statement like that?

A I don't recall it, your Honor.

THE COURT: Well, now, the question is not whether you recall it, Mr. Cormack, but the question is, can you tell this Court whether you made a statement—that statement or one similar to that statement, to Mrs. Gattman?

A I don't remember it.

MR. MARSTERS: Are you through?

THE COURT: No, I want to pursue this a little further.

Is it possible that you could have made this statement but that you have forgotten about it?

A Well, I don't know what—if I forget it—I wasn't in the habit of discussing with jurors—none of my business.

THE COURT: Can you give us a precise answer to the question concerning the testimony of Rosemarie Gattman when she said yesterday that in the middle of the trial somewhere you said to her, "Oh, that wicked fellow, he is guilty"? Can you tell us whether you made that statement or one similar to that?

A Well, I don't remember doing it. I can't say I did.

THE COURT: Would you say it's possible that you did make a statement like that but you have forgotten about it?

[fol. 316] A Well, I didn't have the habit of discussing with jurors. It's very unlikely.

THE COURT: Well, I know, it's not what you are in the habit of, Mr. Cormack. The question now is whether you made that statement or one similar to that to Mrs. Gattman.

A If I don't remember it I can't say that I did.

THE COURT: Well, let's pursue this further.

MR. MARSTERS: Q Well, Mr. Cormack, was there any other time that you can remember that you discussed this case with any of these jurors?

A I never discussed the cases with jurors.

Q Well, you are making that as a general statement, Mr. Cormack, like in all the time that you have been a

bailiff you never discussed a case with a juror, but we are interested in the Parker jury only, and you could have not talked to the jurors in a thousand cases and yet might have talked to one in the Parker jury. We are only interested in the Parker jury.

A I made a point of not discussing the case with the jurors.

Q Did you make that point in the Parker case?

A That's my recollection.

Q Well, this is a pretty important statement and this is a pretty important case, and it certainly is important to Mr. Parker.

[fol. 317] A I don't hear you distinctly, Mr.—

THE COURT: Mr. Marsters, I am wondering—the Court is going to permit you to assume a position here closed to the witness. Mr. Cormack has difficulty hearing you.

THE WITNESS: I hear, but it doesn't do much good.

THE COURT: That's all right, Mr. Cormack.

MR. MARSTERS: (Moving nearer witness) Q Can you hear me now?

A Yes, hear any ordinary tone.

Q All right. It isn't very often I am accused of not talking loud enough, I assure you that.

Mr. Cormack, now this an important case to Mr. Parker, and your testimony on this is important and what you did with a thousand jurys at some other time isn't here in this case. We want to know what you did in the Parker jury, and to make a statement to a juror that a man is guilty or is guilty of a crime, or something of the kind, is a pretty strong statement, and it would seem to me that if you are talking with a juror and made a comment like that you could remember it.

A Well, I can't remember it and I have a fairly good memory.

Q Well, then, can't you tell the Court whether you did or didn't make it?

A I will say I didn't.

[fol. 318] Q Are you positive about it?

A Well, I dont' remember doing it. Let me say I am positive.

Q Well, can you tell the Court whether or not you discussed anything about the Supreme Court correcting an error if one was made?

A I can't remember referring to the Supreme Court, or any occasion to refer to the Supreme Court.

Q Well, are you saying that when you can't remember—I don't want to put words in your mouth. When you say you can't remember, that means to you that you did not make it?

A That is so.

Q Is that the way you are trying to put it?

A I won't admit to doing anything I don't remember.

MR. MARSTERS: Well, I don't know how to approach it any more, your Honor.

THE COURT: Well, Mr. Cormack, now you heard the testimony of Mrs. Genevieve Inwards yesterday, didn't you?

A I only heard some of it. She spoke very rapidly and very indistinctly.

THE COURT: I see. Now, she says she heard you make this statement, "Don't worry. He is guilty." Did you make any statement like that?

A Who was supposed to be worrying?

THE COURT: Well, the statement was, "Don't wor- [fol. 319] ry. He is guilty." That was the statement you made in Mrs. Inwards' presence. Do you remember making any statement like that?

A I don't recall.

THE COURT: Would you say you did or that you did not make that statement?

A Well, I would say that I did not if I don't remember it.

THE COURT: You are saying you did not make the statement because you are telling us you just don't remember, is that it?

A I can't imagine my saying such a thing.

THE COURT: Well, of course, that's not the question. The question is whether you did or did not make the statement, but you are telling us you don't remember making any statement like that?

A If I can't remember it I can't admit it.

THE COURT: So you are denying it because you don't remember making it, is that a fair statement of your testimony?

A That's right. That's a fair statement.

THE COURT: All right. Now, let's go on to another matter, this note that went to Mr.—I have difficulty pronouncing his name.

MR. MARSTERS: Kolibaba.

THE COURT: Can you remember handing him a note?

A I think I remember that in this case, but I got so many notes from relatives, sometimes cases of husbands [fol. 320] and wives that I don't remember this clearly.

THE COURT: All right. Do you have a memory of giving Mr. Kolibaba a note?

A Yes, I remember now, after hearing his testimony.

THE COURT: And did you read the note before you delivered it to him?

A Yes, I always made a point of that.

THE COURT: And can you tell us what the note said?

A Well, something from his wife about her injuries, as I recall.

THE COURT: It was something from his wife about her illness?

A Something like that, but I just don't remember the thing from my mind right afterwards.

THE COURT: Do you remember who gave you the note?

A I don't.

THE COURT: Did you discuss this matter with Judge Oppenheimer?

A This matter of the note?

THE COURT: Yes, about the note.

A Well, I—I didn't have it. I—when I receive a note and see what's important on it I hand it to the man, the juror.

THE COURT: And you think the note was about the illness of his wife?

[fol. 321] A It had nothing to do with the case.

MR. PARKER: Your Honor, I am having a hard time hearing.

THE COURT: Me or—

MR. PARKER: No, the witness, your Honor.

THE COURT: All right. We will have to speak up. Now, how many notes did you pass to Mr. Kolibaba?

A Only one I recall.

THE COURT: Were you ever informed that there should be no communication with the jury by anyone during the trial? Were you ever given those instructions?

A By the Judge, you mean?

THE COURT: Yes.

A I don't recall it, but what I knew was an important thing, I passed it on to the proper party.

THE COURT: But you made the decision as to whether the note was important, is that right?

A Yes, that's right.

THE COURT: You didn't ask the Judge to make that decision?

A No, I don't think I did.

THE COURT: Well, I have pursued this as far as the Court wants to go and I have interrupted you there a little bit, Mr. Marsters, but you may proceed.

MR. MARSTERS: Q Mr. Cormack, did the Court ever instruct you that nobody was to communicate with the jurors?

[fol. 322] A I didn't get that.

Q As a bailiff, did the Judge ever talk to you and talk to the bailiffs, that you should not permit anybody to contact the jury?

A Of course. This was not a personal contact.

Q Pardon?

A This was not a personal contact. It was a note. I saw the contents.

Q Oh. You are saying that you do remember the instructions but you don't have any—it didn't have any effect on your handing a note?

A That was my understanding, no personal contact at all.

Q And you read the note, and at the time it was unimportant to you, or at least not bearing on the case or anything of that kind, so you dismissed it from your mind?

A Simply personal between two members of a family.

MR. MARSTERS: That's all I have.
THE COURT: Mr. Haley?
MR. HALEY: May counsel approach the bench?
THE COURT: I will permit you to get up here too so he can hear you a little better.

CROSS EXAMINATION

BY MR. HALEY:

Q Mr. Cormack, the note that was passed, there was [fol. 323] no note passing during the deliberations, however, was there?
A Oh, no, it was prior to the deliberations.
Q And you never passed, to your recollection, a note during the deliberations?
A Oh, no.
Q Now, on one occasion, on Sunday, you did leave the jury in charge of Mr. Kendall and Mrs. Blomquist, didn't you?
A I did.
Q But you faithfully kept them together thereafter and at all other times, didn't you?
A They were always in attendance by a juror—by a bailiff.
Q And you were there at all times except on that Sunday, weren't you?
A That's right.
Q And, however, on that Sunday you have no personal knowledge of whether or not they were kept together by the bailiffs, do you, because you weren't there?
A No, because I trusted in the bailiffs.
Q You trusted in them, but you don't know what happened, do you?
A No, I don't.
Q Have you ever seen or talked or been with Mrs. Gattman since the time of the trial?
A I think I met her once or twice out near her home.
[fol. 324] Q And what was the occasion for this?
A Why, I was out walking. I often walk in the afternoons or evening, and I knew her address and I dropped along and said hello to her and met one of her daughters.

Q Yes. You stopped out and visited with her, didn't you?

A Yes, just in a friendly way.

Q And you have come to know her as a very nice person, haven't you?

A Yes, I was quite interested in her, her nationality, Spanish, and so forth.

Q And, as a matter of fact, she is quite fond of you, isn't she?

A I don't know. She never said so.

Q Well, I mean you have always been extremely friendly, haven't you?

A Yes, we have.

Q And how did it happen that you didn't stop and call on Mrs. Inwards?

A On who?

Q On Mrs. Inwards?

A I saw Mrs. Inwards in her garden one time and met her husband.

Q But that was just by running into her?

A Just by accident. I was taking a walk.

Q You didn't go to any other juror's except Mrs. [fol. 325] Gattman's, did you, personally?

A I was taking a walk and I live at 67th and Burnside and she lives a little further east.

THE COURT: How much further east?

A Well, in Montavilla, but I was almost to Montavilla.

THE COURT: You live at 67th and Burnside?

A Yes.

THE COURT: And where does Mrs. Gattman live?

A 182nd and—oh, Mrs.—

THE COURT: Gattman.

A She lives somewhere not far from 80th Avenue, if I remember right, near 80th.

THE COURT: How did you get out to her place?

A Walked.

THE COURT: You walked from 65th street out to 80th street?

A I walk miles and miles every evening, or frequently.

THE COURT: Maybe more of us ought to follow that practice.

A Well, when I was young I had to walk.

THE COURT: I am not criticizing you, I am commending you for it.

A Well, I hope so.

MR. HALEY: Q You had gotten to know a little bit during the trial too, hadn't you?

[fol. 326] A I was friendly with all of the jurors, in a strict way. I don't believe in having them sad and—

Q That's true, but you had gotten to know her during the time of the trial, hadn't you?

A Yes, during recess and going and coming to meals.

Q And you did, on occasion, chat with her, didn't you?

A Yes, I did.

Q And you chatted with others, too, on the jury, didn't you?

A Yes.

Q Knowing Mrs. Gattman as you do, do you believe her when she testifies under oath?

A Well, I believe she thinks I said it.

Q Yes, but in other words, you—

A I don't—

Q Excuse me.

She isn't a person, to your knowledge, who would deliberately lie, is she?

A Well, I didn't think so.

Q And you don't think so now, do you?

A Well, no, not deliberately.

Q Now, you don't recall being instructed by the Judge about communication between third persons, do you?

A I have heard it often enough.

Q You were instructed this time then, weren't you?

[fol. 327] A Of course.

Q Now, could you tell us where you picked the note up? Let's assume—Judge Oppenheimer's courtroom is quite similar to this one, and as I recall the jury room it's in the same location as this one, isn't it?

A The jury room is there (indicating).

Q Yes. Can you tell us whether or not the spectators are sitting in this courtroom where the person was when you picked up the note?

A I think they came in that door, that door would be open when the jury was locked up (indicating).

Q They came in here when the jury was locked up, and you took the note from them?

A Yes.

Q And then you went and knocked on the door and went in?

A I presume that's the way I got in. That other door is always locked and I have a special key to it.

THE COURT: Now you are referring to the outside door, in the hallway?

A Yes, and it's locked with a special key. In fact, you have to have a master key to open it. Nobody can open it without a master key.

MR. HALEY: Q And this was at a time when the jury was locked up, and you knocked on the door and took it in, is that right?

[fol. 328] A That's right.

Q Do you recall it said, "I am sick. Come home," or what it said?

A I don't recall. I dismissed it from my mind.

Q It was about her illness?

A I dismissed it from my mind.

Q As a matter of fact, you mentioned to Mrs. Gattman, "That woman is neurotic," didn't you?

A Who is neurotic?

Q Do you recall mentioning to Mrs. Gattman, speaking of the woman that passed the note, "That woman is neurotic"?

A No, I don't.

Q Is it possible you said that?

A No, I don't know the woman.

Q Is it possible you said this?

A Not possible.

Q Not possible at all. Is that correct?

A That's right.

Q All right. Now do you recall speaking to me out in the corridor just at recess?

A I spoke briefly to you, yes.

Q Yes. And did I ask you this question—did I ask you, "Do you recall saying to Mrs. Gattman, 'That Lee Parker is guilty,' or words to that effect?" Did I ask you that question?

[fol. 329] A Pardon?

Q Do you recall my asking you that question out in the hall, just outside the men's washroom, just a moment ago? Do you remember my asking you that question?

A You did what?

Q Do you remember during this last recess today, outside the men's washroom, I came up to you and I said, "Do you remember saying 'Lee Parker is guilty' to Mrs. Gattman?" Do you remember my asking you that question?

A Yes.

Q And what did you tell me?

A I think I said I wouldn't say such a thing.

Q Did you not tell me, "I don't remember it, and that's just what I am going to have to say. I won't perjure myself." Do you remember I patted you on the back and said, "I know you won't"?

A Well I don't remember.

Q You don't remember this series of events?

MR. MARSTERS: What series of events?

A I remember the incident today, yes.

MR. HALEY: Q This is what I am getting at. Today, outside the men's washroom, did this happen?

A Yes.

Q Did I come up to you and say, "Mr. Cormack, do you remember saying 'Lee Parker is guilty' to Mrs. Gattman"?

[fol. 330] A Yes.

Q You remember that?

A Yes.

Q And did you say, "I don't remember saying such a thing; I just don't remember, and that's what I am going to have to say today because I won't perjure myself." Now isn't that what you said?

A That's right.

Q All right.

Now, in truth and in fact, Mr. Cormack, you do not remember, do you, whether you did or did not say this?

A I don't remember saying it. That's all I can say.

Q Yes, and you don't remember one way or the other, do you?

A I can only remember one way, that I didn't say—I don't remember saying it.

Q Yes. Well, is everything that you forget or don't remember,—do you feel doesn't happen?

A Well, there are many things we forget.

Q Right. And many times the things we forget are things that actually happened, aren't they?

A That may be.

Q Do you have a recollection, on the 23rd day of April,—

When was the trial?

MR. PARKER: It was between the 24th day of April [fol. 331] and the 3rd day of May of 1961.

MR. HALEY: (Continuing) Q —on the 25th day of April in 1961,—on the 25th day of April in 1961 do you have an independent recollection of coming down to the courthouse on that day?

A No, I don't, but I guess I did.

Q Did you not then, come to the courthouse because you don't remember coming?

A I presume I came to the courthouse. I was here at the trial.

Q But you have no independent recollection of it?

A Well, you can't remember everything that happened every day of your life.

Q Right; but you just feel sure that even though you don't remember coming to the courthouse that you came?

A That's right.

Q So this is an event that you don't remember happening but you are sure it happened, is that right?

A That's right.

Q Now you don't remember whether or not you said to Mrs. Gattman, "Lee Parker is guilty," or words to that effect, do you?

A I don't remember it. That's all I can say.

Q But it could have happened, isn't that correct?

A But it didn't happen.

[fol. 332] Q It could have happened, couldn't it?

A Well, probably.

Q Do you recall going to the movie with the group?

A Yes.

Q And what was the movie?
A It was an absent-minded professor, if I remember right.
Q Was that the name of it?
A I think so. MacMurray was the hero of the—
Q Do you like Fred MacMurray?
A In that, yes, very much.
Q How many of the jury went?
A Everybody. I made a point that everybody was there.
Q And all three bailiffs went, didn't they?
A Yes. I was authorized by Mr. Harold Graham to take them, and I gave a check for the admission and recovered it from the County afterwards.
Q Yes.
One thing you are sure of, aren't you, Mr. Cormack, at the movie, all three bailiffs were at that movie, weren't they?
A Right. It was a very important thing they were all there.
Q Do you remember going out to Vernonia?
A Yes.
Q How many buses, one, two, three?
[fol. 333] A Well, I had an idea it was only one, but there was carriages, there was conveyances.
Q But there was one, was there?
A There might have been more. There was 17 people. There might have been a second bus for the jurors.
Q Where did the Judge ride?
A The Judge rode with somebody else, I don't remember who. My job is looking after the jury.
Q How old are you, Mr. Cormack?
A How old am I?
Q Yes, sir.
A Eighty-nine.
Q Eighty-nine.
Mr. Cormack, in truth and in fact, during the course of the trial and before the jury reached its verdict, you yourself had a personal feeling that Mr. Parker was guilty, didn't you?
A I had—I don't remember whether I had any feeling in the matter.

Q Do you remember a conversation with William Sundstr m, attorney for Mr. Parker, in which you said to Mr. Sundstrom that Lee Parker was guilty, or words to that effect?

A I might have said that.

Q You might have said that?

A Yes.

[fol. 334] MR. HALEY: I have no further questions, your Honor.

THE COURT: Anything further, Mr. Marsters?

MR. MARSTERS: Just one more.

REDIRECT EXAMINATION

BY MR. MARSTERS:

Q Mr. Cormack, can you hear me?

A Not very well. I am sorry.

Q It's perfectly all right. I enjoy the walk (approaching witness).

Did you discuss the Parker case with Mrs. Gattman after the jury's verdict?

A I don't believe we did.

Q Never talked about it at all?

A I don't think so. I may have. It's all past and gone then, but I don't recall it. I can't remember everything I would say on all these occasions.

Q Well, I understood from the questions of Mr. Haley that you have walked out to her house on several occasions.

A Well, but—on one occasion.

Q On just one occasion?

A That I can recall.

Q And was that after the jury's verdict?

A Oh, yes. That's just one of my usual walks, and I dropped around because I knew where she lived.

[fol. 335] Q Well, did you walk out and visit with her before the Parker case?

A Oh, Lord, no.

Q You had never met the woman before the Parker case?

A No, I had not.

Q Didn't even know her from any beatnik?

A No, I didn't.

Q Your entire acquaintance was acquired as a result of her being an alternate on the jury?

A That's right; that's right.

Q And so you walked out to her house on one occasion after the jury verdict?

A As I said, I was taking a walk and so I dropped by because I knew her address.

Q That is fine. I just wanted to get the sequence. You talked to her after the trial was over?

A Once or twice I was out there, and we never discussed the case at all.

Q And during the walks there was no occasion to chat—

A I didn't walk with her.

I met her outside her home.

Q Well, you never walked with her during any of these walks?

A Well, I didn't have her in my group on that Sunday.

Q Well, was that the only time you went for a walk?

[fol. 336] A The only time I took the jury for a walk was on that Sunday afternoon.

Q And you did not walk beside Mrs. Gattman?

A No, I did not. I don't think she was in the party.

Q I see. Well, if she was there you didn't walk with her?

A No, I don't think she was there. There were three or four men and three or four women.

Q I see. That's this Sunday afternoon when you came back,—

A That's right.

Q —that is the one time you went on a walk?

A That's right.

Q Is that the only time you went on a walk?

A That I can recall, except between here and the hotel, of course.

Q All right. Between here and the hotel did she ever walk beside you?

A Well, we—I used to walk along the line and talk to one or another, but I usually took up the rear and let somebody else lead.

Q I didn't understand.

A I said I had them frequently go in pairs anyhow, and I had somebody lead and I took up the rear to see that nobody spoke to them if they met on the street.

Q I see. Well, did you talk with the jurors on these [fol. 337] occasions?

A Occasionally I did, just about the weather or something else.

Q But not about the case?

A Oh, Lord, no.

Q Well, why are you so positive you didn't talk about the case?

A I made a habit of not doing it.

Q Well, why did you form that habit?

A Because I had to. It's not for me to discuss the case with the jury. I had a good training under Judge Oppenheimer.

Q And so you just made it a positive rule not to discuss the case with any juror at any time?

A I did.

Q Pardon?

A I did.

Q And you feel that that's what you did in the Parker case?

A That's right.

MR. MARSTERS: That's all.

THE COURT: Anything further, Mr. Haley or Mr. Parker?

MR. HALEY: I think not, thank you.

* * * *

[fol. 341] ROSEMARIE L. GATTMAN, having been recalled on behalf of the Plaintiff, in rebuttal, and having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HALEY:

MR. PARKER: Your Honor, I don't think that letter is important one way or the other—but I would appreciate it if the clerk would check it up.

THE COURT: Did she testify she received a copy of this letter?

MR. HALEY: I didn't ask her.

MR. PARKER: I don't think I sent her one.

MR. HALEY: Q Mrs. Gattman, during the course of the trial of which we are speaking, you did have occasion to chat with Mr. Cormack, did you?

A Yes, sir.

Q And you got to know him rather well?

A Yes, sir.

Q And, as a matter of fact, you two became rather friendly, didn't you?

A Yes.

Q And did you see him after the trial?

A Yes.

Q How many times?

A He took me to dinner twice.

[fol. 342] Q Took you to dinner twice?

A And once he—

Q And at all times you have——

THE COURT: She didn't get to finish her answer.

MR. HALEY: Oh, excuse me.

A (Continuing) —and once he came to my home.

MR. HALEY: Q Oh, twice he took you to dinner and once came to your home?

A Yes.

Q And you have, today, a strong feeling of affection for him, don't you?

A Yes, I certainly do.

Q And do you recall in the jury room a statement of Mr. Cormack relative to the note that he delivered?

A Yes.

Q What was said, to the best of your recollection?

A He shook his head and he said, "Oh, that woman is evidently very neurotic. She is sick," and—

Q And who did he say this to?

A Well, he said it to the group that was there. He was not speaking directly to me. He was speaking to whoever was there.

Q Do you remember who was there?

A Well, I think Mrs. Inwards.

Q But you are not sure?

[fol. 343] A I am pretty sure she was because we were together.

Q Uh-huh. And did Mrs. Drake—why is she not here today?

A I spoke to her yesterday, asked her was she coming, and she said No, that she had been excused, that she is working.

Q Yes. She had to work today, didn't she?

I have no more questions.—All right, just a second.

(Conference between Mr. Haley and Mr. Parker.)

MR. HALEY: I have no further questions.

THE COURT: Cross-examination?

MR. MARSTERS: None, your Honor. That will be all.

* * * * *

[fol. 345] FLO V. BLOMQUIST, having been recalled on behalf of the Plaintiff, in rebuttal, and having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HALEY:

Q Mrs. Blomquist, Mr. Cormack testified that the jury was housed in the Old Heathman, that is, the Park Haviland. Is that true?

A Well, I said that it was the New Heathman, but I might be mistaken because we have been on so many trials at the New Heathman that I could be confused and it seems to me when I stop to think about it, it could have been the Old Heathman.

Q Could be the Old Heathman?

A I think it probably is the Old Heathman instead of the New.

MR. HALEY: Fine. I have no further questions.

THE COURT: Just a second. Mr. Parker may want to ask you a question.

MR. PARKER: That is all.

THE COURT: Mr. Parker, do you want to bow in deference to your lawyer, or do you want to ask a question?

MR. PARKER: No, I bow to my attorney, your Honor.

MR. HALEY: That is all, Mrs. Blomquist.

* * * *

[fol. 346] (The Witness Gattman responding from back of courtroom:)

FURTHER DIRECT EXAMINATION

BY MR. HALEY:

Q In talking to me or in coming down to see me, or in making the affidavit, or in testifying here today, has there been any influence, pressure, coercion, or anything that prompted you to come here other than the desire to tell the truth?

A No, absolutely not.

MR. HALEY: No further questions.

THE COURT: Do you desire to ask her any questions?

MR. MARSTERS: I believe I do, your Honor.

THE COURT: All right. Maybe you had better take the stand now, Mrs. Gattman, if they are going to interrogate you some more here. It will be more comfortable for you.

(The Witness Gattman resumed the witness stand.)

[fol. 347] CROSS EXAMINATION

BY MR. MARSTERS:

Q Mrs. Gattman, you did go to Mr. Haley's office with Mrs. Parker, Mrs. Drake, and Mrs. Inwards?

A Yes, sir, I did.

Q And then in the presence of Mr. Haley, and by him asking you questions, you told him substantially what you have testified here to?

A That's right.

Q And that is in the presence of the other three witnesses?

A That's right.

Q And Mr. Haley took notes?

A No, he didn't take notes then.
Q He didn't take any notes of what you said?
A No, he just listened to us.
Q All right. Then did you prepare the affidavit you signed?
A Did I prepare it?
Q Yes.
A I don't understand what you mean.
Q Did you type it out?
A Oh, no.
Q Who did?
A I don't know.
Q Did you see anybody typing it out?
[fol. 348] A No, sir, I didn't.
Q How long after you were in Mr. Haley's office was it before you went back to sign it?
A Well, it was quite a few weeks, I think. He had to have it prepared.
Q And this is all after you three, that is, Mrs. Gattman, Mrs. Inwards, and Mrs. Drake—
A Yes.
Q —were in the home of Mrs. Parker?
A Yes.
Q And listened to the recording made by Mr. Parker?
A Yes.
Q Did you contact these ladies?
A No, I didn't.
Q Did you contact them any time subsequent—
A They contacted me.
Q They contacted you?
A Yes.
Q Which one first?
A Mrs. Inwards contacted me first and then Mrs. Parker.
Q And then Mrs. Drake?
A No; no, just the two ladies.
MR. MARSTERS: Thank you.
MR. JUBA: I think that is all.
THE COURT: Anything further?

[fol. 349] REDIRECT EXAMINATION

BY MR. HALEY:

Q Mrs. Gattman, I didn't make any note here. Do you recall I was talking into my machine?

A Oh, yes, I remember that.

Q And when you came in to sign the affidavit you read it over, didn't you?

A Oh, yes, I did.

MR. HALEY: That is all.

* * * *

[fol. 350] GENEVIEVE S. INWARDS, having been recalled on behalf of the Plaintiff, in rebuttal, and having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HALEY:

Q Mrs. Inwards, do you, of your own knowledge, know that Mrs. Drake asked to be excused today because she had to work?

A Yes, I do.

Q May I ask you now, at any time in going to Mrs. Parker's house, or talking to me, or making your affidavit, or coming down here today, were you ever unduly influenced, coerced, improper suggestions made, or anything designed to have you do anything except tell the truth?

A Nothing at all.

MR. HALEY: Now, if the Court please, I am still of the opinion, and I am confident I am right, that we cannot inquire into the motive or the reasons—the reasoning process by which the jurors arrived at their verdict, and I think we are awfully close to that point when we will rule on that point.

THE COURT: The Court has reached that stage.

MR. HALEY: All right. Well, we had had some question on the subject.

THE COURT: The question is whether any of these alleged incidents had affected her judgment in any way,

[fol. 351] which I think doesn't violate the concept of the law which you have just stated.

MR. HALEY: Well, I thing it does, really, your Honor. I want to go into that, and if I am overruled on the subject I would want to ask Mrs. Inwards about this.

THE COURT: I am not going to overrule you. If you disagree with the Court on this subject—

MR. HALEY: Well, the point is I don't think it is correct to inquire into how they arrived at the verdict. All they can do is testify what happened, and you see, if the Court feels you can inquire into whether these things affected them or not, I would want to ask Mrs. Inwards some questions. Otherwise I don't want to inquire, because I think it is improper.

THE COURT: Well, this is your witness and if you want to interrogate the witness on any matter you may do so, and if there is an objection I will rule on it and otherwise I will not.

MR. HALEY: Well, you see, your Honor,—

THE COURT: In other words, you want the Court to make the error or you don't want to invite any error.

MR. HALEY: Well, that's true, your Honor. But if the Court ruled this way I would have the right to inquire.

Now, could we do this, your Honor, take it under the Rule? This is sort of an equity proceedings.

[fol. 352] THE COURT: No, you will have to either fish or cut bait here. You are going to have to ask the questions and the Court will make the rulings. I can't anticipate what questions you are going to ask.

MR. HALEY: Well, you see, I want to ask her the same type of question that was asked Mr. Kolibaba.

THE COURT: Well, why don't you ask the question and we will take a look at it?

MR. HALEY: But I don't want to have my asking her that a waiver to my objecting to this type of thing; you see, that's the point, and I think I am right in this. If the Court is going to rule that a question like was made to Mr. Kolibaba is correct then everybody ought to be able to do it.

THE COURT: Well, what did you want to ask her?

MR. HALEY: Well, I am going to ask her whether or not she changed her verdict and how this was arrived at and how she felt about it.

THE COURT: No, this would be improper, in the Court's mind.

MR. HALEY: Well, that's what I thought.

THE COURT: There were no such questions asked Mr. Kolibaba.

MR. HALEY: Oh, I think pretty much, your Honor, and if the Court ruled against me I would go into the question of whether these things that happened didn't [fol. 353] have some effect on her, because I think they did.

THE COURT: Let me ask the witness one question and see if I can get at this.

Mrs. Inwards, I think you answered this yesterday but let me pinpoint it in a little different language and see if you can answer it for us. Now, you were a juror on this case?

A Yes.

THE COURT: And you were one of those jurors who deliberated on the case?

A Right.

THE COURT: In other words, you weren't an alternate?

A No, I wasn't. I surely wish I was.

THE COURT: Now I want to ask you, did you base your decision solely and exclusively upon the sworn testimony which you heard from the witnesses who appeared before you during the trial, and the instructions which the Court gave you?

MR. HALEY: Now,—

THE COURT: Just a minute now.

MR. HALEY: Before she answers I wanted to note my objection to the question on the same grounds.

THE COURT: Yes.

Now that calls for a Yes or No answer, and then I will permit you to qualify your answer if you care to. Do [fol. 354] you want me to repeat the question since the interruption?

A Please. Yes.

THE COURT: Did the verdict which you arrived at —was that verdict based upon—solely and exclusively upon the sworn testimony which you heard from the various witnesses that appeared during the trial, and the instructions which the Court gave you?

A I am afraid it wasn't your Honor. I am afraid—

THE COURT: All right. Now you tell us which way it was not. In other words, were you influenced by outside events?

A Well, actually I wouldn't know. I hadn't really realized, I might have been influenced but I could have been. I didn't know what was proper and what wasn't, if that's what you are asking—at any time.

THE COURT: Yes, but that isn't the question I am asking you. You didn't know about this at that time, did you?

A About what?

THE COURT: These incidents that have been referred to here.

A Oh, yes, I did, some of them.

THE COURT: Did that in any way influence your judgment?

A They could have without me really realizing it.

THE COURT: Well, that isn't what I want—

A I know this isn't what you want but—

[fol. 355] THE COURT: Let's be more specific. You said that Mr. Cormack said to you, in your presence, "Don't worry, he is guilty." Did you hear him make that statement?

A I heard him make that statement. There was no discussion. It was just—(pausing)

THE COURT: Now you told the Court you heard that statement, didn't you?

A Yes, I did.

THE COURT: Did that statement in any way influence your decision which you made in the case?

A I didn't think so at the time. I didn't realize it.

THE COURT: Do you think so now?

A I realize now it could have, yes.

THE COURT: You said that you saw the bailiff hand a note to one of the jurors?

A Yes.

THE COURT: Did that event in any way influence your judgment in this case?

A Not at the time, I didn't realize that it was—that it wasn't the thing to do. I didn't know.

THE COURT: You see, Mrs. Inwards, the question now isn't what could have happened, but the Court wants to know whether these events which you have told about in any way influenced your judgment.

A I am quite sure that event didn't influence my [fol. 356] judgment, at the time it didn't, I mean, but—May I say something, your Honor?

THE COURT: I want you to answer in any language you want to.

A Well, realizing later what seemed to be in the note, if I didn't actually hear what was in the note, but it seemed that he must have been under pressure to be in a hurry to leave, or something.

THE COURT: Now who was under pressure?

A Mr. Kolibaba, that received the note; and it just seemed that there were—oh, different things that influenced them in sort of hurrying up their decision, or something. It just seemed that way.

THE COURT: Was that note handed to the juror when you were deliberating in the case?

A No, but it just seemed the general feeling that they wanted to get things going, you know, not to lag. I can't really remember what day that was or when it was in the case that that note was delibered.

THE COURT: Well, did you feel, in deliberating as a juror, you were being hurried by the Court or by anyone in any way?

A I was being hurried, yes, not by the Court.

THE COURT: Well, the evidence is you were deliberating 26 hours, is that correct?

[fol. 357] A Yes.

THE COURT: That's a long time.

A It is a long time. I realize it.

THE COURT: Now, yesterday when I asked you this question in a little different language you told the Court that these statements which you heard made by the bailiff to other jurors in your hearing did not affect your judgement.

A I didn't think so.

THE COURT: Now are you changing your judgment?

A Well, does it have to be "Yes" or "No"?

THE COURT: Well, Mrs. Inwards, the problem that I want you to recognize is this, that this Court has a very heavy decision to make.

A I know that. I am sorry.

THE COURT: And the decision is going to be based upon what I hear from the sworn testimony, and I have to believe you or believe other witnesses. Do you understand that?

A Well, there's something I have found out since I testified yesterday. I am not the only one mixed up in this case, so many don't remember, and this and that, and—

THE COURT: Well, do you feel they are mixed up?

A Well, they don't remember this and don't remember that, and I thought I was the only one who didn't remember.

THE COURT: We are only asking you to testify to what you do remember.

[fol. 358] A Yes. I am sorry. I did say I was sure and it didn't affect my decision, but taking it on a whole I imagine it was just the general feeling that—that—oh, that everyone seemed to be in a hurry to get it over with, and they didn't want to seem to take time to think of this or discuss it, or something.

THE COURT: But you had 26 hours and you tell this Court that you didn't have time to discuss and think about it?

A Well, your Honor, it was because I didn't agree with them.

THE COURT: Well, of course that was your constitutional right.

A Yes, it was.

THE COURT: Now you heard—let me ask you this. Did you receive an instruction—I want you to go back a step. You served on other cases that month, didn't you, that month, in different courts?

A Yes, in different courts.

THE COURT: And did you hear instructions which the judges gave in different courts in which you sat as a juror?

A Certainly.

THE COURT: Did you hear an instruction that you would base your decision solely and exclusively upon the sworn testimony you would hear from the witnesses, and not on other matters?

[fol. 359] A I did.

THE COURT: Did you hear Judge Oppenheimer give you that instruction as a juror?

A Yes, twice, I believe.

THE COURT: Can you tell me now if you violated that oath, or if you conscientiously followed that oath which you took in the Lee Parker case?

A I must have violated it when I turned in that last vote, I am sorry, because it actually wasn't the way I felt.

MR. HALEY: What was the last answer?

THE COURT: She says she must have violated it when she turned in the last vote.

What do you mean by that?

A Because that is the only time I voted "Yes" instead of "No" and we took several.

THE COURT: Did you think you were pressured by someone to change your vote?

A I was pressured.

THE COURT: By whom?

A The jurors.

THE COURT: The other jurors?

A Yes. I didn't realize at the time he—I just figured it was done. I didn't know.

THE COURT: In what way did they put pressure on you?

A Well, they took turns trying to explain to me why I [fol. 360] was wrong.

THE COURT: Did you feel this was their duty as a fellow juror?

A I didn't feel it was their duty. It was shaking me up plenty, but I didn't know. I didn't want to complain. I didn't want to be a baby or something, about it, al-

though they weren't doing this to the others, and I wasn't the only one that—(pausing)

THE COURT: If you thought you were being pressured in any way did you think about calling this matter to the attention of the Court?

A Well, like I just said, I didn't know it wasn't the thing to do; I didn't know. I thought all the jurors did this, they thought I was the weakest one and they were going to make me change my mind.

THE COURT: During the month did you sit on other cases in which there was a difference of opinion?

A Oh, yes, but it wasn't anything this important. I mean it wasn't a matter of a man's life, you might say. I didn't serve on any of that kind of case.

THE COURT: Did you change your mind in some of the other cases?

A No, none of the jurors tried to make me change my mind in any of the other cases.

THE COURT: I will permit any further interroga-
[fol. 361] tion of this witness by either side in the case.

MR. HALEY: Well, with the note of the objection that I have I would like to pursue this further.

THE COURT: Let me ask you this question now. Do you take an exception to any of the questions which the Court has put to this witness?

MR. HALEY: Well,—

THE COURT: I want you to answer that Yes or No.

MR. HALEY: Your Honor, the problem is that there were a number of questions asked which I wouldn't have had any objection to. I did object to this line of questioning, your Honor, because we do feel it isn't permissible, but there were some—

THE COURT: Let the record indicate you are objecting to this latter line of inquiry which the Court made of this witness, is that correct?

MR. HALEY: For this specific reason, that—

THE COURT: I didn't ask for your reason. I want to know if you are objecting.

MR. HALEY: Let me understand. If the Court's line of questioning is going to whether or not these events affected her verdict, if that's what the Court was inquiring about, then I object to that line of questioning.

THE COURT: That was the sole purpose of the inquiry.

MR. HALEY: I object to that line of questioning—[fol. 362] but the Court has inquired over my objection and for this reason it will either be in or out, depending on how the Court decides it, and if it is in I would like to pursue the line a little further without waiving my objection.

THE COURT: All right. You may do so.

MR. HALEY: Q Now, as a matter of fact, after this pressuring you finally succumbed, didn't you?

A Well, really I didn't realize it was for that reason but I remember our foreman saying everyone else had written out their last vote. It was the last vote we had taken and they had all written their vote and they were all waiting for me and I still couldn't—just couldn't seem to—we had done this over and over and over, and it just seemed—and I just blame no one but myself. It just seems—I still can't explain if that was why I changed my vote.

Q And, as a matter of fact, you felt so strongly about it that you went down to see Judge Oppenheimer, didn't you?

A Yes, sir.

Q And what did you discuss with him?

A (Weeping) I don't know why I went to see him, really. It just—I knew that he couldn't do anything about it. He was kind.

Q Well, what did you tell him, Mrs. Inwards?

A Well, I just said that I—I just actually didn't vote as I felt I should. I was—really couldn't explain why. [fol. 363] Q But there was nothing you could do about it then, was there?

A No.

Q And you have been through a living hell since that time, haven't you?

A (The witness nodded and wept.)

Q And you do believe, do you not, and you can tell the Court that all the things that happened, taken as a whole, and including the statement of Mr. Cormack, you do agree that these things did influence your verdict, don't you?

A I am afraid they did, yes.

MR. HALEY: Thank you, Mrs. Inwards.

THE COURT: When you went down to see Judge Oppenheimer did you tell him about the fact that Mr. Cormack had made statements about the guilt or innocence of Mr. Parker?

A I don't think I mentioned that to him, your Honor.

THE COURT: Did you mention anything about the misconduct of his bailiff?

A I don't believe so. He was just so kind to us and so considerate and everything, I didn't—I didn't realize there was anything out of the way, I mean these statements that were made was just—just something like something that has happened so many years ago, so many things stick in your mind and so many don't.

THE COURT: Since you testified yesterday who [fol. 364] have you talked to about the case?

A Well, Mrs. Gattman, and this noon I had lunch with the lady bailiff. We became quite good friends during the trial.

THE COURT: Who else did you talk to?

A Oh, Mr. Haley has talked to me at times.

THE COURT: Did you discuss with him anything about the testimony you gave yesterday?

A No, he just—I told him it was worse than I thought it would be.

THE COURT: But did you discuss with any of these people the specific testimony which you gave yesterday?

A I don't believe so, your Honor, but I just—

THE COURT: Did you tell any of them that you might change your testimony today?

A No, I didn't. I didn't know I was to be called today.

THE COURT: Did Mr. Haley talk to you about being recalled at this time?

A Well, he just asked if I could be down, he might need to. I didn't know for sure.

THE COURT: Did he discuss with you the questions he was going to ask you?

A No, he didn't.

THE COURT: All right.

Anything further, Mr. Marsters, or Mr. Haley, or Mr. Parker?

[fol. 365] CROSS EXAMINATION

BY MR. MARSTERS:

Q Well, who did you room with during the trial?

A Margaret Shafer.

Q And I don't like to belabor this, Mrs. Inwards, either. What you did is what you did and nobody is here trying to criticize you, particularly me, and I hope you don't think I am when I ask you these questions, because everyone has to live with their own conscience, but you did feel and have felt ever since the verdict was rendered, that you did something grievously wrong?

A Yes, sir.

Q And it has been on your conscience and you are, trying, and have tried, to do anything you could to rectify what you think was a mistake?

A Yes, sir.

Q And in that attitude and with that attitude you have talked with Mrs. Gattman and Mrs. Drake and others about the case?

A Not too often.

Q Well, now, it isn't a question of how often. You have?

A It has come up in conversation, yes. Actually, I haven't seen either one of them more than twice, I don't think, since the trial.

Q Well, you saw them and you were in Mrs. Parker's home?

[fol. 366] A Oh, yes. I am sorry.

Q And you heard the record, tape recording, that Mr. Parker made, and of course you have been very sympathetic with him, haven't you?

A Yes, sir, because of the way I felt during the trial.

Q What I would like to know, Mrs. Inwards, and this isn't to—sincerely I state it—to criticize anything you have said, but is it possible that Mrs. Gattman's remarks to you at the time of your conversations with her and in front of Mrs. Parker have—is something that you don't honestly remember but think you do?

A No, whatever I have said I did remember, I remembered. I do, like certain remarks I have herad made. It's just like so many things are vague, but I find it was vague to a lot of the other jurors, too, I have heard since.

Q As I understood your testimony yesterday, you can't tell us on which trip or where it was this remark was supposed to have been made by Mr. Cormack?

MR. HALEY: If the Court please, this is not a proper question on re-cross, just where they were.

THE COURT: Well, I think—

MR. MARSTERS: I think this whole field is proper.

THE COURT: —you have opened this up in connection with the witness's testimony yesterday, and I will allow it.

THE WITNESS: I am sorry. I didn't remember your [fol. 367] question.

MR. MARSTERS: Q As I remember your testimony yesterday, you don't remember where this alleged statement was made by Mr. Cormack, to Mrs. Gattman?

A Not specifically, no, not which was said in which—whether we were on a walking trip, like on Sunday, or if it might have been sometime going between the courthouse and the hotel. I really couldn't say for sure.

Q Do you actually remember Mrs. Gattman walking beside Mr. Cormack?

A Yes, sir.

MR. HALEY: If the Court please, I object to this line of questioning on the ground these are identical questions. We did not mention anything in our redirect about this. We have been over this ground before. I object to it.

THE COURT: I am going to overrule your objection, and you may inquire if you care to.

Anything further Mr. Marsters?

MR. MARSTERS: Well, your Honor, I feel like we are belaboring a point, and I think I shall rest.

THE COURT: All right.

Anything further, Mr. Haley?

MR. HALEY: Yes, your Honor, just a couple of questions.

[fol. 368] REDIRECT EXAMINATION

BY MR. HALEY:

Q Now, Mrs. Inwards, as you testified yesterday, many things are hard to remember. That's true, isn't it?

A Yes.

Q Some things have stuck in your mind, haven't they?
A That's right.
Q The exact words of what Mr. Cormack said you don't remember word for word, true?
A No, sir.
Q But you remember that they were words to the effect, "Don't worry, he is guilty"?
A That's right.
Q And you do remember that?
A Yes.
Q Now, you were asked by Mr. Marsters if, because of your qualms of conscience and to rectify the wrong, you would do anything to correct it.
A Yes, sir.
Q Would you put a limitation on you would do "anything"?
A Well, after what I have been through I don't believe so.
Q Well, would you stoop to perjuring yourself here?
A I am afraid so. I think that that's what I have already done.
Q Well, maybe you don't understand the question.
[fol. 369] A I mean what I stated yesterday, and so forth.
Q What I mean is you wouldn't get up here and lie to correct the wrong?
A Not deliberately, no.
Q You wouldn't lie to correct the wrong, deliberately or undeliberately, would you?
A No. I have one of these consciences, I just can't live with it, that's all.
MR. MARSTERS: I think that is enough.
MR. HALEY: I think I am entitled, after the unfortunate remark, that the record should be straightened out.
THE COURT: All right, you try to straighten it out.
MR. HALEY: Q You stated you would do anything to correct the wrong that was done, is that correct?
A Yes.
Q But in an effort to correct something wrong you wouldn't come up here and lie, would you?
A No, sir.

Q And your testimony, to the best of your ability, has been true, hasn't it, here?

A That's right.

Q Yes. Now, in talking with Mrs. Gattman you weren't—you did not forget—let me withdraw that question.

Mrs. Gattman did not suggest to you, did she, that it would be a good idea to remember this, or that she [fol. 370] remembered it and therefore you should? You remembered it yourself, didn't you?

A No, she didn't suggest anything.

Q You discussed it with her and you did remember it?

A Yes, we discussed it.

MR. HALEY: I have no further questions.

RECROSS EXAMINATION

BY MR. MARSTERS:

Q Well, even assuming you had forgotten, the point is in things that you had forgotten—and you did testify that you had forgotten many things and in discussing them you recalled that they did actually happen,—

A That's right.

Q —because you refreshed your recollection, and whether your memory was refreshed or whether you always remembered it, regardless of conversation with Mrs. Gattman or anything, you remember that Mr. Cormack said these words?

A I remember now that I heard these things said, yes.

THE COURT: And you are telling the Court, as I understand now, it's possible that they could have influenced your judgment?

A Well, it's like Mr. Haley said. We were discussing these things and I think any of the jurors, your Honor, like even our lady bailiff, for instance, we were discussing [fol. 371] this today, this noon, and there were things that she didn't recall and there are these things, but there are certain things that you don't think might bring another thing to mind, and these were the things that I remembered.

THE COURT: Yes, but you don't answer my question. You told us yesterday that this statement by Mr. Cormack did not influence your judgment in any way.

A Well, that's what I meant just now, your Honor, when I said I must have perjured myself.

THE COURT: When must you have perjured yourself?

A Well, yesterday I said it didn't.

THE COURT: In other words, you weren't telling the truth yesterday?

A I didn't feel it did, but after listening to all these others, I was the first up here, you remember, your Honor, and this is quite new to me. After listening to all of that and everything, I couldn't help thinking that I am not the only vague one around here. It just—

THE COURT: We aren't talking about this.

A I know, your Honor, but I am just trying to explain that all in all it must have influenced me. I didn't realize it at the time.

THE COURT: Now, Mrs. Inwards, you know you served as a juror a whole month, didn't you?

A Yes, sir.

[fol. 372] THE COURT: And you saw witnesses get in that same chair you are in.

A Yes.

THE COURT: And you saw lawyers cross-examine them, and when you got on this witness stand yesterday you knew you were going to be cross-examined on these things, didn't you?

A Yes, sir.

THE COURT: This wasn't a new experience for you.

A Well, this is a new experience to sit here.

THE COURT: Yes, but I mean you had seen this happen to hundreds of other witnesses while you were here.

A Oh, not hundreds, your Honor.

THE COURT: Well, you served a whole month here, didn't you?

A Yes, but not hundreds.

THE COURT: And you know when a witness gets on the stand and tells his story there is cross-examination.

A Oh, I realize it.

THE COURT: Anything further by either side?
MR. HALEY: Yes, your Honor.

ReREDIRECT EXAMINATION

BY MR. HALEY:

Q You keep using the word you "must have perjured" yourself. Do you know what perjury is?
[fol. 373] A Some of the testimony I gave wasn't true.
Q But perjury would be a deliberate swearing before God,—
A Oh, I am sorry.
Q —taking an oath to tell the truth, and deliberately telling a falsehood. You aren't talking about that?
A I didn't realize—
Q But that—
THE COURT: Now, Mr. Haley, we're going to have to call you as a witness here. You are testifying.
MR. PARKER: Your Honor, I intend to put Mr. Haley on as a witness.
THE COURT: Do you want to put Mr. Haley on as a witness?
MR. PARKER: In a minute, after this witness is finished.
MR. HALEY: Now, your Honor, this is one of those instances where I am objecting to that.
THE COURT: This is your witness and I am going to show you great latitude in connection with examining her, but your questions are leading and suggestive.
MR. HALEY: Yes, your Honor, I appreciate that, but a man's life is at stake. This is equity. The State has had no objection, and I think they do so because they are like all of us, they want the truth, and this is why I ask this leeway.
THE COURT: Yes, but we have a witness here who [fol. 374] is apparently confused and when you ask these leading questions I think you further confuse the witness.
MR. HALEY: Well, I think the record is quite clear as to what she meant when she said she had perjured herself, and I think that was quite important to clear up.

THE COURT: No one objected to that, but now you want to pursue the matter further and I have no objection but I don't want you to ask leading questions.

MR. HALEY: I appreciate that, your Honor.

THE COURT: You see, Mrs. Inwards, here's the problem the Court is up against. Your testimony in this case is very important, you can see that. That's why you are brought back here today, and I have to decide whether I believe you yesterday or believe you today, and that is the place you put the Court in, and that's why I want you to know that every answer you give to a question here is very important. No one wants to pressurize you in any way, but we must get the truth. You can see that.

A Yes, sir.

THE COURT: All right.

Now does anybody else want to ask this witness a question?

MR. HALEY: One thing.

Q These things, I know, weigh heavily on you. Are you what you would characterize a deeply religious person?

[fol. 375] A Yes, sir.

Q Now—

One moment, your Honor.

I have no further questions.

THE COURT: Now, Mr. Marsters, do you care to ask any further questions?

MR. MARSTERS: No, your Honor.

* * * *

[fol. 376]

IN THE
CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
DEPARTMENT NO. 8
PORTLAND 4, OREGON

[File Endorsement Omitted]

ALFRED T. SULMONETTI
Judge

OPINION—July 31, 1964

HONORABLE ROBERT Y. THORTON, Attorney General
State of Oregon
Department of Justice
Supreme Court Building
Salem, Oregon

ATTN: MR. C. L. MARSTERS, Asst. Attorney General

HONORABLE GEORGE VAN HOOMISSEN, District Attorney
Multnomah County
Portland, Oregon

ATTN: MR. GEORGE E. JUBA, Chief Deputy, Criminal Department

MR. GEORGE P. HALEY
Attorney at Law
American Bank Building
Portland 5, Oregon

In re: Lee E.A. Parker v. C.T. Gladden,
Warden of the Oregon State Penitentiary
Case No. 300-660

Gentlemen:

This matter is before the Court upon a Petition for Post Conviction Hearing, based upon plaintiff's petition

filed on April 24, 1964 and amended petition filed July 23, 1964. The case arises from a conviction of second degree murder in the case of State of Oregon v. Lee E.A. Parker, Multnomah County file C-36135.

The Court has considered the evidence as it relates to each issue raised by the plaintiff in his petition and amended petition and will consider in this opinion only those issues which were not disposed of by decision given by the Court during the trial. These issues are unauthorized communication to the jury by the bailiff and separation of the jury during the trial.

The Oregon Legislature, in connection with delibera-
[fol. 377] tions, custody and communications with juries, provided in ORS 17.305 as follows:

> "After hearing the charge, the jury . . . if they retire . . . must be kept together . . . under the charge of one or more officers, until they agree upon their verdict or are discharged by the court. The officer shall, to the utmost of his ability, keep the jury together, separate from other persons, without drink, except water, and without food, except ordered by the court. He must not suffer any communication to be made to them, nor make any himself, unless by the order of the court, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed on. Before any officer takes charge of a jury, this section shall be read to him, and he shall be then sworn to conduct himself according to its provisions to the utmost of his ability."

The alleged unauthorized communications are that the bailiff assigned to the trial, stated to members of the jury during the progress of the trial, "Oh that wicked fellow, he is guilty;" "If you find him guilty and there is anything wrong, the Supreme Court will correct it;" and the passing of a note from a spectator in the courtroom to the bailiff who, while the jury was deliberating for the purpose of reaching its verdict, gave said note to the juror to whom it was addressed.

Unauthorized communications made by a bailiff to a jury have been the subject of a number of decisions by the Supreme Court of Oregon. The most recent criminal case dealing with this question is *State* v. *Kristich*, 226 Or 240. There the unauthorized communication occurred while the jury was taken to a restaurant for dinner. One of the jurors asked the bailiff "if it were necessary for them to reach a verdict," to which the bailiff replied ". . . that defendant had been tried once before and therefore it was necessary to arrive at a verdict." The Court, speaking through Justice Sloan, reveiwed the numerous decisions in this area and aligned the state of Oregon with those jurisdictions which hold that prejudice will be presumed and a new trial ordered when it appears that the bailiff has improperly communicated with the jury.

In the case of *Carson* v. *Brauer*, 234 Or 333, decided May 29, 1963, unauthorized communications were made to the jury by the bailiff in charge. There the Court, in a civil case, took occasion to modify the Kristich case to the extent that prejudice will not be presumed by a mere [fol. 378] showing that the bailiff had improperly communicated to the jury. The Court held that in such cases they should be "remanded to the trial court with instructions for it to determine what, if any, misconduct had occurred and whether such misconduct 'materially affected the substantial rights' of the defendant." The Court further stated that "unless the remarks actually prejudiced the plaintiff's case, the judgment should not have been vacated and a new trial should not have been ordered."

With respect to the charge that the jury was separated during the trial, the most recent decision by the Supreme Court of Oregon was decided March 25, 1964 in the case of *Downes* v. *Plank*, OAS Vol. 78, p 571. In this case the Court adhered to its earlier decision of *Nickelson* v. *Smith*, 15 Or 200, in holding that "separation of a jury during its deliberations is contrary to the express requirements of ORS 17.305, and, if objected to, constitutes reversible error," and further holding that the matter of setting aside a verdict and granting a new trial is within the sound discretion of the trial court. It is to be noted that while this was a civil case, the Court held in clear

and precise language that the statutory requirements with respect to separation of jury should be strictly followed in order to preserve the purity of the verdict.

In the light of these decisions, the Court has reviewed the testimony and has reached the conclusion that the statements made by the bailiff to the effect that "Oh that wicked fellow, he is guilty," and "If you find him guilty and there is anything wrong, the Supreme Court will correct it," violated the specific provisions of ORS 17.305. The Court having found from the evidence that these statements were made to members of the jury during the trial of the case, passes to a consideration as to whether this unauthorized communication and misconduct "materially affected the substantial rights of the defendant."

In a criminal case, the burden upon the jury is an awesome one, for its decision affects the freedom and in some cases the life of the defendant. Therefore, any unauthorized communication, especially by an officer of the Court, which goes to the very heart of the jury's concern, namely the innocence or guilt of the defendant, may be the influencing statement which guides a juror to reach a decision.

In the instant case, the trial lasted eight days. There is evidence that during this period some of the jurors were taken to a movie, to Washington Park and for a walk on the waterfront. These events provided opportunity for close association between the jurors and bailiffs assigned to the trial, and under such circumstances the greatest of care should have been exercised to assure that no statement concerning the merits of the case should be [fol. 379] made to them.

Concerning the allegation that an unauthorized note was passed to a juror during deliberation, the Court finds from the evidence that such fact did occur. The bailiff, Mr. Cormack, admitted the passing of the note and the juror admitted receiving it. The bailiff's testimony is to the effect that he first read the note which advised the juror that there was illness in his family. The juror, Mr. Kolibaba, testified that the note contained information

about a birthday party. In the light of this evidence the question is raised—"what information did the note really contain?" It is a well settled rule in this state that any communication with the jury after the case is submitted to them and they have retired for the purpose of deliberating and reaching a verdict, shall be done in open court and in the presence of the parties. If we are to preserve and maintain public confidence in the administration of our courts and the integrity of jury trials which is the bulwark of our liberty, the juries deliberations and pronouncements must be kept pure and untainted, not only from all improper influences, but from the appearances thereof.

In *Oien* v. *Bourassa*, 221 Or 359, decided April 20, 1960, involving comments by a bailiff to jurors, Justice Paul Harris, speaking for the Court stated: "The sanctity of the jury and its freedom from outside influences must be jealously guarded by the court. Contacts between court officers and jurors, except as authorized by law, are not to countenanced." In the instant case, the record discloses that the jury deliberated approximaetly twenty-six hours before reaching its verdict. The language in the Kristich case is of particular significance in the instant case wherein the Court states: "The length of the deliberation alone is evidence of doubt in the minds of the jurors. Therefore, it is impossible for us to know to what extent they could have been pursuaded by the inward thought of further long deliberation when a verdict was thought to be required."

The influence which unauthorized communications may exert upon the jury are too infinite and varied to be the subject of disproof and our Court in such cases has followed the only safe rule—that of granting a new trial. In the case of *Thomas* v. *Dad's Root Beer*, 225 Or 166, our Court held: "Under the circumstances, therefore, we cannot say that it is clear that the 'misconduct could not and did not influence the verdict.' (Citing cases)"

In dealing with the questions here presented, the problem facing this Court was succinctly stated in the case of *State* v. *Gardner*, 230 Or 569, where the Court, speak-

ing through Justice O'Connell stated: "In each case the court must choose between two conflicting interests; on one hand the interest of the individual who claims that the misconduct deprived him of a fair trial, and on the [fol. 380] other hand the interest of the public in protecting the verdict from attack."

The language in the Kristich case is of particular significance in the instant case—"In a felony case, particularly where the penalty, as here, can be of long duration, the greatest of care should be exercised to obtain a fair trial. The rule should be inviolate that the jury can consider only such evidence and instructions that it receives in the courtroom. . . . When we are in doubt the issue should be resolved in favor of the accused."

The case which gives rise to the instant case was tried by one of the most able and experienced trial judges of our state and it is the considered judgment of this Court that if the matters alleged in plaintiff's petition had been called to the Court's attention, the Court, on its own motion, would have granted the defendant a new trial.

From a consideration of all of the evidence, the Court has reached the conclusion that the unauthorized communication was prejudicial and that such conduct materially affected the rights of the defendant.

It is, therefore, ordered that the defendant be granted a new trial.

Yours very truly,

/s/ Alfred T. Sulmonetti

ATS:d

[fol. 381]

IN THE
CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

No. 300 660

LEE E. A. PARKER, PLAINTIFF

vs.

C. T. GLADDEN, Warden of the Oregon State Penitentiary,
DEFENDANT

JUDGMENT ORDER—August 5, 1964

THIS MATTER coming on for hearing pursuant to plaintiff's petition for post conviction relief, the plaintiff being present in person and with his attorney, George P. Haley, the defendant not being present but represented by his counsel C. L. Marsters, Assistant Attorney General for the State of Oregon, the witnesses being sworn, their testimony taken, argument of counsel being heard, and the Court being fully advised in the premises and good cause therefore showing;

NOW THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that judgment herein be, and it hereby is, made in favor of the plaintiff and against the defendant; and

IT IS FURTHER ORDERED AND ADJUDGED that the judgment of conviction in this matter in the case of State of Oregon vs. Lee E. A. Parker, Multnomah County file C-36135, wherein the petitioner herein, the same being the defendant in the aforesaid C-36135, was convicted of second degree murder and sentence of life imprisonment in the Oregon State Penitentiary imposed be, and the same hereby is, set aside and made as naught; and

IT IS FURTHER ORDERED AND ADJUDGED that the petitioner herein, the same being Lee E. A. Parker be, and he hereby is, granted a new trial in Multnomah County, Oregon in case C-36135.

DATED this 5 day of August, 1964.

/s/ Alfred T. Sulmonetti
Judge

[fol. 382]

IN THE
CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

No. 300-660

[Title Omitted]

NOTICE OF APPEAL BY CLARENCE T. GLADDEN
—Filed August 28, 1964

TO: LEE E. A. PARKER, Plaintiff, and to GEORGE P. HALEY, Attorney for Plaintiff.

You and each of you will please take notice that the defendant Clarence T. Gladden, Warden of the Oregon State Penitentiary, defendant in the above entitled cause and court does hereby appeal to the Supreme Court of the State of Oregon from that certain order and judgment and the whole thereof made and entered in said cause and court on the 5th day of August, 1964, in favor of the above named plaintiff and against the above named defendant and providing as follows:

"NOW THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that judgment herein be, and it hereby is, made in favor of the plaintiff and against the defendant; and

IT IS FURTHER ORDERED AND ADJUDGED that the judgment of conviction in this matter in the case of State of Oregon vs. Lee E. A. Parker, Multnomah County file C-36135, wherein the petitioner herein, the same being the defendant in the aforesaid C-36135, was convicted of second degree murder and sentence of life imprisonment in the Oregon State Penitentiary imposed be, and the same hereby is, set aside and made as naught; and

IT IS FURTHER ORDERED AND ADJUDGED that the petitioner herein, the same being Lee E. A.

Parker be, and he hereby is, granted a new trial in Multnomah County, Oregon in case C-36135.

DATED this 5 day of August, 1964.

/s/ ALFRED T. SULMONETTI
Judge"

[fol. 383] This notice is given this 24th day of August 1964.

ROBERT Y. THORTON
Attorney General of Oregon

/s/ C. L. Marsters
C. L. MARSTERS
Assistant Attorney General
Attorneys for Defendant

[fol. 384]

IN THE
CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

No. 300-600

[File Endorsement Omitted]

[Title Omitted]

DESIGNATION OF RECORD ON APPEAL IN POST CONVICTION PROCEEDINGS—Filed August 28, 1964

Comes now defendant and hereby designates the entire record in this post conviction proceeding including the transcript of testimony of the trial and hearing herein and all of the exhibits offered and received in evidence in the post conviction hearing.

Dated this 24th day of August, 1964.

ROBERT Y. THORNTON
Attorney General of Oregon

/s/ C. L. Marsters
Assistant Attorney General
Attorneys for Defendant

[fol. 385]

[CERTIFICATES OF SERVICE Omitted in Printing]

[fol. 386]

* * * *

IN THE SUPREME COURT OF THE STATE OF OREGON

IN BANC

PARKER, RESPONDENT

v.

GLADDEN, APPELLANT

Appeal from Circuit Court, Multnomah County.

ALFRED T. SULMONETTI, Judge.

Argued and submitted September 9, 1965.

W. M. Thompson, Salem, argued the cause for appellant. On the brief were Robert Y. Thornton, Attorney General, Salem, C. L. Marsters, Assistant Attorney General, Salem, and George Van Hoomissen, District Attorney, Portland.

William J. Sundstrom, Portland, argued the cause and filed a brief for respondent.

Before MCALLISTER, Chief Justice, and PERRY, SLOAN, GOODWIN, DENECKE, HOLMAN and LUSK, JUSTICES.

OPINION—Nov. 3, 1965

REVERSED.

DENECKE, J.

The petitioner seeks post-conviction relief. He was convicted of second-degree murder in 1961 and his conviction was affirmed upon appeal by this court. In his petition for post-conviction relief he alleges misconduct upon the part of the jury and bailiff. A hearing was had and the post-conviction trial court found misconduct, that such misconduct was prejudicial, and ordered a new trial. The warden appeals.

[fol. 387] The post-conviction statute (ORS 138.550(2)) provides:

> "When the petitioner sought and obtained direct appellate review of his conviction and sentence, no

> ground for relief may be asserted by petitioner in a petition for relief under ORS 138.510 to 138.680 unless such ground was not asserted and could not reasonably have been asserted in the direct appellate review proceeding. * * *"[1]

Petitioner alleged that he could not have raised the issue of misconduct prior to this time. The trial court made no finding on this issue. We will assume for the purposes of this decision that the issue of misconduct could not reasonably have been raised upon appeal.[2]

From the opinion of the trial court we believe it found that the following occurred: (1) During the trial, the bailiff stated to an alternate juror about the defendant, "Oh, that wicked fellow, he is guilty." This was overheard by a regular juror; (2) The bailiff told an unknown juror during the course of the trial, "If there is anything wrong the Supreme Court will correct it." This was overheard by two regular jurors; and (3) After deliberations had commenced, the bailiff handed a note to a juror from the juror's wife. The note either pertained to the juror's birthday or informed him of his wife's illness or accident. These findings were largely based upon the testimony of certain jurors which was adduced at the post-conviction hearing.

The trial court apparently was of the opinion that [fol. 388] the merit of the post-conviction petition should be judged by the same criteria as that statutorily fixed for judging a motion for new trial. It concluded "that the unauthorized communication was prejudicial and that such conduct materially affected the rights of the defendant." (The latter is the test established for the granting of a new trial. ORS 17.610.)

The trial court apparently did not consider whether the conduct constituted a ground for relief as stated in the post-conviction statute.

---

[1] This only applies if petitioner was represented on appeal by counsel, which he was.

[2] We need not pass upon the possible conflict between the above-quoted statute and Faye v. Noia, 372 US 391, 83 S Ct 822, 9 L ed2d 837 (1963).

The grounds for post-conviction relief are limited. Error at the trial, even though it be considered reversible, prejudicial or materially affecting the rights of the party, is not necessarily a sufficient basis upon which to grant post-conviction relief. Post-conviction is not a delayed appeal. The basic purpose of the Act was not to enlarge the grounds for post-conviction relief; it was to end the confusion over which of the common-law writs was the proper vehicle to seek relief by providing a single exclusive remedy. *Brooks* v. *Gladden*, 226 Or 191, 195, 358 P2d 1055, cert den 366 US 974, 81 S Ct 1942, 6 L ed2d 1263 (1961); *Strong* v. *Gladden*, 225 Or 345, 348, 358 P2d 520 (1961); Collins and Neil, *The Oregon Post-conviction-Hearing Act*, 39 Or L Rev 337 (1960).

ORS 138.530 provides that post-conviction relief shall be granted only when one or more of the following grounds is established:

> "(a) A substantial denial in the proceedings resulting in petitioner's conviction, or the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void.
>
> [fol. 389] "(b) Lack of jurisdiction of the court to impose the judgment rendered upon petitioner's conviction.
>
> [(c) and (d) have no application here.]
>
> "(2) * * * where such relief would have been available prior to May 26, 1959 [the effective date of the act], under the writ of habeas corpus * * *."

The question we have is whether the bailiff's conduct, found by the trial court to be error and prejudicial to the petitioner's cause, amounts to a substantial denial of petitioner's rights under the Constitutions of the United States or Oregon.[3]

In *Brooks* v. *Gladden*, supra, we observed that in this state a party has an absolute right to have the jury

[3] The bailiff's statement that the defendant was guilty is the most flagrant error and it will not be necessary to treat the other two grounds.

polled. However, we then went on to hold that a deprivation of such right is not a substantial denial of a constitutional right.

That the indictment does not state facts constituting a crime can be asserted as error for the first time upon appeal. *State* v. *Goesser;* 203 Or 315, 280 P2d 354 (1955). Nevertheless, we have held that the failure of the indictment to state facts sufficient to constitute a crime is not a ground for post-conviction relief. *State* v. *Cloran*, 233 Or 400, 414, 374 P2d 748, 377 P2d 911, 378 P2d 961, 98 ALR2d 732 (1963).

Other courts have likewise held that mere reversible error is not grounds for post-conviction relief. *United States ex rel Tisi* v. *Tod*, 264 US 131, 44 S Ct 260, 68 L ed 590 (1924), was a federal habeas corpus appeal. Mr. Justice Brandeis for the Court stated, "Under these circumstances mere error, even if it consists in finding an essential fact without adequate support-[fol. 390] ing evidence, is not a denial of due process of law." (264 US at 134)

Sunal v. *Large*, 332 US 174, 67 S Ct 1588, 91 L ed 1982 (1947), was likewise a federal habeas corpus appeal. The petitioner was convicted of violating the Selective Service Act by not reporting for induction. At the trial he offered evidence to show that his selective service classification was invalid. Proving this would have been a complete defense. The trial court held such evidence to be inadmissible. This was thought to be the law at the time; however, the United States Supreme Court had not passed upon the issue. The petitioner took no appeal. Subsequently, in another case, the Supreme Court decided that trial courts should determine whether defendants' draft classification was correct.

The majority, speaking through Mr. Justice Douglas, held that the petitioner Sunal should have appealed and had no right to habeas corpus. The Court stated:

> "An endeavor is made to magnify the error in these trials to constitutional proportions by asserting that the refusal of the proffered evidence robbed the trial of vitality by depriving defendants of their only real defense. But as much might be said of many

> rulings during a criminal trial. Defendants received throughout an opportunity to be heard and enjoyed all procedural guaranties granted by the Constitution. Error in ruling on the question of law did not infect the trial with lack of procedural due process. * * *" (332 US at 182).

Turner v. *State of Louisiana*, 379 US 466, 85 S Ct 546, 13 L ed2d 424 (1965), concerned the constitutional effect of misconduct in caring for the jury. This was [fol. 391] heard upon certiorari to the state supreme court. The defendant was convicted of murder. The chief deputy sheriff and another deputy were principal witnesses for the prosecution. They testified that the defendant led them to the clip from the murder pistol and made a confession to them. The voluntariness of the confession was an issue and these deputies were crucial witnesses upon this issue. In accordance with Louisiana law, the jury was placed in charge of the sheriff. In fulfillment of this duty these two deputies "were in close and continual association with the jurors" for the three days of the trial. The court stated:

> "It is true that at the time they testified in open court Rispone and Simmons [the two deputies] told the trial judge that they had not talked to the jurors about the case itself. But there is nothing to show what the two deputies discussed in their conversations with the jurors thereafter. * * * We deal here not with a brief encounter, but with a continuous and intimate association throughout a three-day trial —an association which gave these witnesses an opportunity, as Simmons put it, to renew old friendships and make new acquaintances among the members of the jury." (85 S Ct at 550)

The Court reversed, holding that the conduct of the trial violated the Fourteenth Amendment.

> "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public court-

> room where there is full judicial protection of the defendant's right of confrontation, or cross-examination, and of counsel. What happened in this case operated to subvert these basic guarantees of trial by jury. * * *" (85 S Ct at 550)

[fol. 392] In a broad sense the cases are similar. In the *Turner* case, the jury was exposed to out-of-courtroom influence in the form of constant association with the two key witnesses. In this case one regular juror was exposed to out-of-courtroom influence in the form of overhearing the bailiff express his opinion that the defendant was guilty. While there is the similarity, the difference in degree of the out-of-courtroom influence is so great as to lead us to the conclusion that the bailiff's misconduct did not deprive defendant of a constitutionally correct trial.

The problem here, as it is in civil litigation and in direct criminal appeals, is the balancing of the two desirable objectives,—giving finality to verdicts and protecting jurors from harassment, with another equally desirable objective, guaranteeing a constitutionally fair trial to an accused or any other party. *State* v. *Gardner*, 230 Or 569, 574, 575, 371 P2d 558 (1962).

We have frequently cited and quoted *McDonald* v. *Pless*, 238 US 264, 267-268, 35 S Ct 783, 59 L ed 1300 (1915), on the desirability of the first two above-stated objectives:

> "* * * But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private [fol. 393] deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.

"* * * And, of course, the argument in favor of receiving such evidence is not only very strong but unanswerable—when looked at solely from the standpoint of the private party who has been wronged by such misconduct. The argument, however, has not been sufficiently convincing to induce legislatures generally to repeal or to modify the rule. For, while it may often exclude the only possible evidence of misconduct, a change in the rule 'would open the door to the most pernicious arts and tampering with jurors.' 'The practice would be replete with dangerous consequences.' 'It would lead to the grossest fraud and abuse' and 'no verdict would be safe.' *Cluggage* v. *Swan*, 4 Binn. 155 [5 Am. Dec. 400]; *Straker* v. *Graham*, 4 M. & W. 721."

Denying a convicted defendant the right to probe a jury verdict for vulnerability is not a denial of due process of law, *United States* v. *Provenzano*, 240 F Supp 393, 412 (D NJ 1965).

In *State* v. *Ausplund*, 86 Or 121, 135, 167 P2d 1019 (1917), the charge was abortion. After the trial, three jurors made affidavits that during deliberations one juror stated that during a recess a neighbor had told him that the defendant had performed abortions on previous occasions. The trial court refused to grant a new trial and upon direct appeal the conviction was affirmed. The decision of the court in effect was that such evidence would not even be received for the reason that it would destroy the finality of the jury's verdict.

In *State* v. *Ausplund*, supra, it was acknowledged that *Clyde Mattox* v. *United States*, 146 US 140, 13 S Ct [fol. 394] 50, 36 L ed 917 (1892), was to the contrary. This court believed that decision was greatly limited by the later decision of *McDonald* v. *Pless*, supra. The *Mattox* case in any event is not controlling here as it was a direct appeal from a federal court and only held that the lower court committed error, not constitutional error.

Trial by jury is the most satisfactory method we have yet devised to determine disputed facts. We know, however, that it is a rough, imperfect instrument, not a precision tool. We know it is influenced by inside preju-

dices and outside influences, as is any other human institution. Because it is the best procedure we have, we hide its imperfections by granting finality to its verdict. The only exception to such finality is if the imperfection is so apparent and blatant that granting finality would "violate the plainest principles of justice." *McDonald* v. *Pless*, supra, 238 US at 269.

We hold that one juror's overhearing of the bailiff's opinion that the defendant was guilty does not deprive the defendant of a constitutionally fair trial and, therefore, is not a ground for post-conviction relief.

Reversed.

[fol. 395]

IN THE SUPREME COURT OF OREGON

* * * *

Appeal from MULTNOMAH County

LEE E. A. PARKER, RESPONDENT

v.

CLARENCE T. GLADDEN, Warden of Oregon State Penitentiary, APPELLANT

JUDGMENT—Nov. 3, 1965

This cause on September 9, 1965, having been duly argued and submitted upon and concerning all questions arising upon the record and then reserved for further consideration, and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is error as alleged.

IT THEREFORE IS CONCERNED, ORDERED and ADJUDGED that the judgment of the court below rendered and entered in this cause be and the same hereby is in all things reversed and set aside.

IT FURTHER IS ORDERED that appellant have and recover of and from respondent his costs and disbursements in this court taxed at

IT FURTHER IS ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter judgment in accordance herewith.

[fol. 396]

IN THE SUPREME COURT OF OREGON

PETITION FOR REHEARING

Comes now the defendant, Lee Parker, by and through his attorney of record, and respectfully petitions the Court for an order granting a rehearing of the above entitled matter upon questions involving grave and serious issues at law.

In support of the within petition, defendant submits that this Court in rendering its decision, erred in the following particulars:

1. In considering the bailiff's comment, "Oh, that wicked fellow, he is guilty.", as an expression of *opinion* rather than as a statement of *fact.*

2. In attempting to distinguish this case from the case of *Turner* v. *State of Louisiana*, 379 US 466, 85 S Ct 546, 13 L ed 2d 424 (1965), by stating "the difference in degree of the out-of-courtroom influence is so great as to lead us to the conclusion that the bailiff's mis-conduct did not deprive defendant of a constitutionally correct trial."

3. In determining as a matter of law that the bailiff's remark did not deprive defendant of a constitutionally fair trial.

Respectfully submitted,

WILLIAM J. SUNDSTROM,
Attorney for Plaintiff-Respondent,
Lee E. A. Parker.

[fol. 397]

BRIEF OF DEFENDANT LEE E. A. PARKER IN SUPPORT OF PETITION FOR REHEARING

Point One

This Court, in its opinion treats the bailiff's remark as if some passerby commented "I think he is guilty." The opinion speaks of the bailiff's "opinion" when in reality the bailiff unequivocally stated, "Oh, that wicked fellow, he is guilty." It must be remembered that this was a retrial of the same case, which the jury was well aware of due to numerous remarks made by both counsel and from substantive evidence read to the jury from the prior trial and further from the instructions of law given by the trial court. Thus, there could well be in the juror's mind, the impression that the bailiff had at his disposal facts from the prior trial that would not be available to this jury, upon which to base his statement. It was a positive statement of *fact* given to reassure an alternate juror, who was concerned that the defendant, Lee Parker, was not being given a fair shake by the present jury. It was made for the sole purpose of conveying the *fact* that the defendant was in truth guilty and that the ends of justice would be served by a guilty verdict. It was not, and I emphasize was not, an expression of opinion. Nor was it given as his opinion, but rather was given as a statement of fact to alleviate the fears of the alternate juror who thought Lee Parker was being railroaded.

Point Two

This Court gravely erred in attempting to distinguish this case from the case of *Turner* v. *State of Louisana*, 379 US 466, 85 S Ct 546, 13 L ed 2d 424 (1965). This [fol. 398] Court apparently felt that the degree of out-of-court influence in the *Turner* case was greater than in this case, but that is not consistent with the facts. In the *Turner* case the basis of granting a new trial rested upon the fact that two deputy sheriffs were in close and continual association with the jurors for the period of the trial which lasted three days and that the same two deputy

sheriffs were witnesses in the case. In this case the association was not for three days, but rather for eight days. In addition this association was not just during the course of the trial, but rather continued day and night for the total eight day period, as this jury was confined together during the total time of trial. In addition there was a Sunday during which there was no trial, plus an additional day of deliberation. Literally, this bailiff lived with the jurors day and night for the total time, ate with them, accompanied them on walks, accompanied them to church and in theory should have been their sole contact with the outside world. In the *Turner* case, there was no allegation that the deputy sheriffs had made any improper remarks to the jury. In this case, there is a finding of fact that the bailiff did comment on the guilt of the defendant. In the *Turner* case, the association was with a witness. In this case, it was an officer of the court with access to knowledge and facts from a prior trial. In this case he speaks as an officer of the court and states flatly that this wicked fellow is guilty. The facts in this case are so much stronger than in the *Turner* case that it is inconsistent to recognize the *Turner* case as authority and not follow it.

[fol. 399] Point Three

The question of whether the defendant was deprived of a constitutionally fair trial as a result of the bailiff's remark and other improprieties, is a factual question and should have been resubmitted to the trial court for a finding in accordance with the guidelines set down by this Court subsequent to the hearing by the trial court. The trial court had the opportunity of personally hearing the testimony, appraising the credibility of the witnesses and by the trial court's own questioning, determining the effect of the improprieties involved. It is error of the gravest kind to concede as a matter of law that these improprieties could not have denied the defendant a fair trial as the Constitution of the state of Oregon and the United States would guarantee to him.

Conclusion

It is submitted that this Court committed error in attempting to distinguish this case from the *Turner* case, in not recognizing the force of the bailiff's comment and in not re-submitting the matter to the trial court for a determination of the question whether or not the improprieties denied the defendant his right to a Constitutional fair trial. Accordingly, the opinion of this Court should be reversed or in the alternative should be resubmitted to the trial court with instructions to determine the question of the effect of the improprieties in light of the guidelines set down by this Court.

Respectfully submitted,

WILLIAM J. SUNDSTROM,
Attorney for Plaintiff-Respondent,
Lee E. A. Parker.

[fol. 400]

IN THE SUPREME COURT OF OREGON

• • • •

[Title Omitted]

ORDER DENYING PETITION FOR REHEARING AND STAYING MANDATE—Dec. 7, 1965

The court having duly considered respondent's petition for rehearing, and the court being fully advised therein,

IT HEREBY IS ORDERED that respondent's petition be and the same hereby is denied.

The court having also duly considered respondent's motion for stay of mandate pending filing and action on petition for certiorari in the Supreme Court of the United States, and the court being fully advised therein,

IT HEREBY IS ORDERED that said motion for stay of mandate be and the same hereby is allowed.

[fol. 401]

[Clerk's Certificate Omitted in Printing.]

[fol. 402]

SUPREME COURT OF THE UNITED STATES

No. 1093, October Term, 1965

LEE E. A. PARKER, PETITIONER

v.

CLARENCE T. GLADDEN, Warden

ORDER ALLOWING CERTIORARI—April 18, 1966

The petition herein for a writ of certiorari to the Supreme Court of the Oregon is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED
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No. 1093

Supreme Court of the United States

OCTOBER TERM, 1965

LEE E. A. PARKER, *Petitioner,*

v.

CLARENCE T. GLADDEN, Warden of the Oregon State Penitentiary, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

JOHN H. SCHAFER
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Of Counsel:

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Supreme Court of the United States

OCTOBER TERM, 1965

No.

LEE E. A. PARKER, *Petitioner,*

v.

CLARENCE T. GLADDEN, Warden of the Oregon State Penitentiary, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Oregon in the above-entitled case.

CITATIONS TO OPINIONS BELOW

The opinion of the post-conviction trial court (Circuit Court of Multnomah County), unreported, is printed in Appendix A, *infra,* p. 1a. The opinion of the Supreme Court of Oregon — Ore. —, 407 P. 2d 246 (1965), is printed in Appendix B, *infra,* p. 7a.

JURISDICTION

The judgment of the Supreme Court of Oregon was entered on November 3, 1965. A timely petition for rehearing was denied on December 7, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

Where the bailiff in charge of the jury during defendant's murder trial told jurors "Oh that wicked fellow, he is guilty," and "If you find him guilty and there is anything wrong, the Supreme Court will correct it," did defendant's conviction and sentence to life imprisonment violate due process?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this case is Amendment 14, Section 1 of the United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Petitioner seeks review of a decision of the Supreme Court of Oregon which denied post-conviction relief under a statute directing such relief when there has been a "substantial denial . . . . of petitioner's rights

under the Constitution of the United States."* The decision of the Supreme Court of Oregon reversed a decision of the Circuit Court of Multnomah County, which had granted a new trial because of its finding of fact (accepted by the Supreme Court of Oregon) that the bailiff in charge of the jury made statements to members of the jury to the effect that: "Oh that wicked fellow, he is guilty," and "If you find him guilty and there is anything wrong, the Supreme Court will correct it."

Petitioner Lee Parker was convicted of second-degree murder on May 18, 1961, and sentenced to life imprisonment. *Affirmed,* 235 Ore. 366, 384 P. 2d 986 (1963).** Petitioner then filed a petition for post-conviction hearing and relief, alleging, among other things, that he had been denied a fair trial in accordance with due process of law by the misconduct of the bailiff in "discussing the case directly with the jurors," and "passing on the guilt of the petitioner to the jurors during trial." (Amended Petition for Post-Conviction Hearing and Relief, Para. VII.) After a hearing, the Circuit Court of Multnomah County found

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* O.R.S. § 138.530(1)(a):

"(1) Post-conviction relief pursuant to ORS 138.510 to 138.680 shall be granted by the court when one or more of the following grounds is established by the petitioner:

"(a) A substantial denial in the proceedings resulting in petitioner's conviction, or in the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void."

** This was petitioner's second trial. His first conviction, in 1958, had been reversed by the Supreme Court of Oregon on grounds unrelated to the present petition. 225 Ore. 88, 356 P.2d 88 (1960).

as a fact that the bailiff had made the statements quoted above. Noting that the trial had lasted eight days, during which there was opportunity for close association between the jurors and the bailiffs assigned to the trial, and that the jury had deliberated twenty-six hours, the court held "that the unauthorized communication was prejudicial and that such conduct materially affected the rights of the defendant." The court accordingly ordered a new trial for the defendant.

The State appealed to the Supreme Court of Oregon, which accepted the facts as found by the post-conviction trial court, but held that these facts did not result in denying petitioner a "constitutionally fair trial."

The federal question involved in this case arises by the terms of the statute under which petitioner proceeded, O.R.S. § 138.530, which directs relief where federal constitutional rights have been denied. The decision of the Supreme Court of Oregon necessarily passed on this federal question, as indicated by that court's statement of the question to be decided:

> "The question we have is whether the bailiff's conduct, found by the trial court to be error and prejudicial to the petitioner's cause, amounts to a substantial denial of petitioner's rights under the Constitutions of the United States or Oregon," [— Ore. —, 407 P. 2d at 248 (1965).]

REASON FOR GRANTING THE WRIT

The decision of the Court below is in square conflict with a decision of this Court rendered last year: *Turner* v. *Louisiana,* 379 U.S. 466 (1965).

In *Turner,* this Court held that where a trial jury was in the charge of deputy sheriffs who were witnesses for the prosecution, the defendant was denied

his constitutional right to a fair trial by an impartial jury. This Court did not demand proof that the deputies had talked to the jurors about the case, but held flatly that,

> "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." [379 U.S. at 472-73.]

In the instant case, the Supreme Court of Oregon consigned this basic principle to oblivion with these words:

> "Trial by jury is the most satisfactory method we have yet devised to determine disputed facts. We know, however, that it is a rough, imperfect instrument, not a precision tool. We know it is influenced by inside prejudices and outside influences, as is any other human institution. Because it is the best procedure we have, we hide its imperfections by granting finality to its verdict. The only exception to such finality is if the imperfection is so apparent and blatant that granting finality would 'violate the plainest principles of justice.' *McDonald* v. *Pless,* supra, 238 U.S. at 269." [— Ore. —, 407 P. 2d at 250.]

It is true that in many ways the law does not ask how the jury reached its verdict. But this confidence is based on an assumption that the jury can operate in the ideal manner *because* all possible steps are taken to eliminate, wherever visible, "inside prejudices" and "outside influences." Thus we have challenges for cause to eliminate prejudiced jurors; we have reversals where Negroes have been systematically excluded or

where aroused community sentiment is likely to prejudice a jury; and most fundamental and unquestioned, we require seclusion of the jury during its deliberations.

No elaboration is required to see that "what happened in this case operated to subvert these basic guarantees of trial by jury." *Turner* v. *Louisiana,* 379 U.S. at 473. The bailiff, a court official, told jurors the defendant was guilty, and that a guilty verdict—even if erroneous—would be harmless, since it would be corrected by the Supreme Court.

The Supreme Court of Oregon sought to distinguish *Turner* v. *Louisiana* on the grounds that the degree of out-of-court influence in the two cases differed. But the facts in this case show that, if anything, reversal here should follow a fortiori from the decision in *Turner.* In *Turner,* three days' association between the jury and deputy sheriffs who were prosecution witnesses required reversal without more. Here, too, the association between the bailiff and jury had been close and prolonged and the issues were complex, requiring an eight-day trial. But in addition the jury here was sufficiently in doubt about its decision to require twenty-six hours to reach a verdict. And in this case the court found the bailiff had made damaging statements, whereas in *Turner* there was no indication whether the deputies had talked about the case to the jurors.

Petitioner suggests this is a particularly appropriate case for granting certiorari. (1) The issue is important. (2) The facts have been found, following a painstaking hearing under the procedures commendably afforded by the state. (3) The denial of due process is

plain. (4) The conflict with *Turner* v. *Louisiana* is clear. Petitioner would further suggest, indeed, that the issues are so plain that this case should be summarily reversed, without the necessity of further argument on the merits.

For the foregoing reasons, the writ of certiorari should be granted and the judgment of the Supreme Court of Oregon reversed.

Respectfully submitted,

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APPENDIX

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APPENDIX A

Opinion of the Circuit Court, Multnomah County (Alfred T. Sulmonetti, J.)

No. 300-660

LEE E. A. PARKER

v.

C. T. GLADDEN, Warden of the Oregon State Penitentiary

This matter is before the Court upon a Petition for Post Conviction Hearing, based upon plaintiff's petition filed on April 24, 1964 and amended petition filed July 23, 1964. The case arises from a conviction of second degree murder in the case of State of Oregon v. Lee E. A. Parker, Multnomah County file C-36135.

The Court has considered the evidence as it relates to each issue raised by the plaintiff in his petition and amended petition and will consider in this opinion only those issues which were not disposed of by decision given by the Court during the trial. These issues are unauthorized communication to the jury by the bailiff and separation of the jury during the trial.

The Oregon Legislature, in connection with deliberations, custody and communications with juries, provided in ORS 17.305 as follows:

> "After hearing the charge, the jury . . . if they retire . . . must be kept together . . . under the charge of one or more officers, until they agree upon their verdict or are discharged by the court. The officer shall, to the utmost of his ability, keep the jury together, separate from other persons, without drink, except water, and without food, except ordered by the court. He must not suffer any communication to be made to them, nor make any himself, unless by the order of the court, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their delibera-

tions or the verdict agreed on. Before any officer takes charge of a jury, this section shall be read to him, and he shall be then sworn to conduct himself according to its provisions to the utmost of his ability."

The alleged unauthorized communications are that the bailiff assigned to the trial, stated to members of the jury during the progress of the trial, "Oh that wicked fellow, he is guilty;" "If you find him guilty and there is anything wrong, the Supreme Court will correct it;" and the passing of a note from a spectator in the courtroom to the bailiff who, while the jury was deliberating for the purpose of reaching its verdict, gave said note to the juror to whom it was addressed.

Unauthorized communications made by a bailiff to a jury have been the subject of a number of decisions by the Supreme Court of Oregon. The most recent criminal case dealing with this question is *State* v. *Kristich*, 226 Or 240. There the unauthorized communication occurred while the jury was taken to a restaurant for dinner. One of the jurors asked the bailiff "if it were necessary for them to reach a verdict," to which the bailiff replied ". . . that defendant had been tried once before and therefore it was necessary to arrive at a verdict." The Court, speaking through Justice Sloan, reviewed the numerous decisions in this area and aligned the state of Oregon with those jurisdictions which hold that prejudice will be presumed and a new trial ordered when it appears that the bailiff has improperly communicated with the jury.

In the case of *Carson* v. *Brauer*, 234 Or 333, decided May 29, 1963, unauthorized communications were made to the jury by the bailiff in charge. There the Court, in a civil case, took occasion to modify the Kristich case to the extent that prejudice will not be presumed by a mere showing that the bailiff had improperly communicated to the jury. The Court held that in such cases they should be "remanded to the trial court with instructions for it to deter-

mine what, if any, misconduct had occurred and whether such misconduct 'materially affected the substantial rights' of the defendant." The Court further stated that "unless the remarks actually prejudiced the plaintiff's case, the judgment should not have been vacated and a new trial should not have been ordered."

With respect to the charge that the jury was separated during the trial, the most recent decision by the Supreme Court of Oregon was decided March 25, 1964 in the case of *Downes* v. *Plank,* OAS Vol. 78, p 571. In this case the Court adhered to its earlier decision of *Nickelson* v. *Smith,* 15 Or 209, in holding that "separation of a jury during its deliberations is contrary to the express requirements of ORS 17.305, and, if objected to, constitutes reversible error," and further holding that the matter of setting aside a verdict and granting a new trial is within the sound discretion of the trial court. It is to be noted that while this was a civil case, the Court held in clear and precise language that the statutory requirements with respect to separation of jury should be strictly followed in order to preserve the purity of the verdict.

In the light of these decisions, the Court has reviewed the testimony and has reached the conclusion that the statements made by the bailiff to the effect that "Oh that wicked fellow, he is guilty," and "If you find him guilty and there is anything wrong, the Supreme Court will correct it," violated the specific provisions of ORS 17.305. The Court having found from the evidence that these statements were made to members of the jury during the trial of the case, passes to a consideration as to whether this unauthorized communication and misconduct "materially affected the substantial rights of the defendant."

In a criminal case, the burden upon the jury is an awesome one, for its decision affects the freedom and in some cases the life of the defendant. Therefore, any unauthorized communication, especially by an officer of the Court, which

goes to the very heart of the jury's concern, namely the innocence or guilt of the defendant, may be the influencing statement which guides a juror to reach a decision.

In the instant case, the trial lasted eight days. There is evidence that during this period some of the jurors were taken to a movie; to Washington Park and for a walk on the waterfront. These events provided opportunity for close association between the jurors and bailiffs assigned to the trial, and under such circumstances the greatest of care should have been exercised to assure that no statement concerning the merits of the case should be made to them.

Concerning the allegation that an unauthorized note was passed to a juror during deliberation, the Court finds from the evidence that such fact did occur. The bailiff, Mr. Cormack, admitted the passing of the note and the juror admitted receiving it. The bailiff's testimony is to the effect that he first read the note which advised the juror that there was illness in his family. The juror, Mr. Kolibaba, testified that the note contained information about a birthday party. In the light of this evidence the question is raised—"what information did the note really contain?" It is a well settled rule in this state that any communication with the jury after the case is submitted to them and they have retired for the purpose of deliberating and reaching a verdict, shall be done in open court and in the presence of the parties. If we are to preserve and maintain public confidence in the administration of our courts and the integrity of jury trials which is the bulwark of our liberty, the juries deliberations and pronouncements must be kept pure and untainted, not only from all improper influences, but from the appearances thereof.

In *Oien* v. *Bourassa*, 221 Or 359, decided April 20, 1960, involving comments by a bailiff to jurors, Justice Paul Harris, speaking for the Court stated: "The sanctity of the jury and its freedom from outside influences must be

jealously guarded by the court. Contacts between court officers and jurors, except as authorized by law, are not to be countenanced." In the instant case, the record discloses that the jury deliberated approximately twenty-six hours before reaching its verdict. The language in the Kristich case is of particular significance in the instant case wherein the Court states: "The length of the deliberation alone is evidence of doubt in the minds of the jurors. Therefore, it is impossible for us to know to what extent they could have been persuaded by the inward thought of further long deliberation when a verdict was thought to be required."

The influence which unauthorized communications may exert upon the jury are too infinite and varied to be the subject of disproof and our Court in such cases has followed the only safe rule—that of granting a new trial. In the case of *Thomas* v. *Dad's Root Beer,* 225 Or 166, our Court held: "Under the circumstances, therefore, we cannot say that it is clear that the 'misconduct could not and did not influence the verdict.' (Citing cases)"

In dealing with the questions here presented, the problem facing this Court was succinctly stated in the case of *State* v. *Gardner,* 230 Or 569, where the Court, speaking through Justice O'Connell stated: "In each case the court must choose between two conflicting interests; on one hand the interest of the individual who claims that the misconduct deprived him of a fair trial, and on the other hand the interest of the public in protecting the verdict from attack."

The language in the Kristich case is of particular significance in the instant case—"In a felony case, particularly where the penalty, as here, can be of long duration, the greatest of care should be exercised to obtain a fair trial. The rule should be inviolate that the jury can consider only such evidence and instructions that it receives in the

courtroom. . . . When we are in doubt the issue should be resolved in favor of the accused."

The case which gives rise to the instant case was tried by one of the most able and experienced trial judges of our state and it is the considered judgment of this Court that if the matters alleged in plaintiff's petition had been called to the Court's attention, the Court, on its own motion, would have granted the defendant a new trial.

From a consideration of all of the evidence, the Court has reached the conclusion that the unauthorized communication was prejudicial and that such conduct materially affected the rights of the defendant.

It is, therefore, ordered that the defendant be granted a new trial.

APPENDIX B

Opinion of the Supreme Court of Oregon (In Banc)

PARKER, *Respondent*

v.

GLADDEN, *Appellant*

DENECKE, J.

The petitioner seeks post-conviction relief. He was convicted of second-degree murder in 1961 and his conviction was affirmed upon appeal by this court. In his petition for post-conviction relief he alleges misconduct upon the part of the jury and bailiff.[o] A hearing was had and the post-conviction trial court found misconduct, that such misconduct was prejudicial, and ordered a new trial. The warden appeals.

The post-conviction statute (ORS 138.550(2)) provides:

> "When the petitioner sought and obtained direct appellate review of his conviction and sentence, no ground for relief may be asserted by petitioner in a petition for relief under ORS 138.510 to 138.680 unless such ground was not asserted and could not reasonably have been asserted in the direct appellate review proceeding. * * *"[1]

Petitioner alleged that he could not have raised the issue of misconduct prior to this time. The trial court made no finding on this issue. We will assume for the purposes of this decision that the issue of misconduct could not reasonably have been raised upon appeal.[2]

---

[1] This only applies if petitioner was represented on appeal by counsel, which he was.

[2] We need not pass upon the possible conflict between the above-quoted statute and Faye v. Noia, 372 US 391, 83 S Ct 822, 9 L ed2d 837 (1963).

From the opinion of the trial court we believe it found that the following occurred: (1) During the trial, the bailiff stated to an alternate juror about the defendant, "Oh, that wicked fellow, he is guilty." This was overheard by a regular juror; (2) The bailiff told an unknown juror during the course of the trial, "If there is anything wrong the Supreme Court will correct it." This was overheard by two regular jurors; and (3) After deliberations had commenced, the bailiff handed a note to a juror from the juror's wife. The note either pertained to the juror's birthday or informed him of his wife's illness or accident. These findings were largely based upon the testimony of certain jurors which was adduced at the post-conviction hearing.

The trial court apparently was of the opinion that the merit of the post-conviction petition should be judged by the same criteria as that statutorily fixed for judging a motion for new trial. It concluded "that the unauthorized communication was prejudicial and that such conduct materially affected the rights of the defendant." (The latter is the test established for the granting of a new trial. ORS 17.610.)

The trial court apparently did not consider whether the conduct constituted a ground for relief as stated in the post-conviction statute.

The grounds for post-conviction relief are limited. Error at the trial, even though it be considered reversible, prejudicial or materially affecting the rights of the party, is not necessarily a sufficient basis upon which to grant post-conviction relief. Post-conviction is not a delayed appeal. The basic purpose of the Act was not to enlarge the grounds for post-conviction relief; it was to end the confusion over which of the common-law writs was the proper vehicle to seek relief by providing a single exclusive remedy. *Brooks v. Gladden,* 226 Or 191, 195, 358 P2d 1055, cert den 366

US 974, 81 S Ct 1942, 6 L ed2d 1263 (1961); *Strong* v. *Gladden,* 225 Or 345, 348, 358 P2d 520 (1961); Collins and Neil, *The Oregon Postconviction-Hearing Act,* 39 Or L Rev 337 (1960).

ORS 138.530 provides that post-conviction relief shall be granted only when one or more of the following grounds is established:

> "(a) A substantial denial in the proceedings resulting in petitioner's conviction, or the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void.
>
> "(b) Lack of jurisdiction of the court to impose the judgment rendered upon petitioner's conviction.
>
> [(c) and (d) have no application here.]
>
> "(2) * * * where such relief would have been available prior to May 26, 1959 [the effective date of the act], under the writ of habeas corpus * * *."

The question we have is whether the bailiff's conduct, found by the trial court to be error and prejudicial to the petitioner's cause, amounts to a substantial denial of petitioner's rights under the Constitutions of the United States or Oregon.[3]

In *Brooks* v. *Gladden,* supra, we observed that in this state a party has an absolute right to have the jury polled. However, we then went on to hold that a deprivation of such right is not a substantial denial of a constitutional right.

That the indictment does not state facts constituting a crime can be asserted as error for the first time upon

---

[3] The bailiff's statement that the defendant was guilty is the most flagrant error and it will not be necessary to treat the other two grounds.

appeal. *State* v. *Goesser*, 203 Or 315, 280 P2d 354 (1955). Nevertheless, we have held that the failure of the indictment to state facts sufficient to constitute a crime is not a ground for post-conviction relief. *State* v. *Cloran*, 233 Or 400, 414, 374 P2d 748, 377 P2d 911, 378 P2d 961, 98 ALR2d 732 (1963).

Other courts have likewise held that mere reversible error is not grounds for post-conviction relief. *United States ex rel Tisi* v. *Tod*, 264 US 131, 44 S Ct 260, 68 L ed 590 (1924), was a federal habeas corpus appeal. Mr. Justice Brandeis for the Court stated, "Under these circumstances mere error, even if it consists in finding an essential fact without adequate supporting evidence, is not a denial of due process of law." (264 US at 134)

Sunal v. *Large*, 332 US 174, 67 S Ct 1588, 91 L ed 1982 (1947), was likewise a federal habeas corpus appeal. The petitioner was convicted of violating the Selective Service Act by not reporting for induction. At the trial he offered evidence to show that his selective service classification was invalid. Proving this would have been a complete defense. The trial court held such evidence to be inadmissible. This was thought to be the law at the time; however, the United States Supreme Court had not passed upon the issue. The petitioner took no appeal. Subsequently, in another case, the Supreme Court decided that trial courts should determine whether defendants' draft classification was correct.

The majority, speaking through Mr. Justice Douglas, held that the petitioner Sunal should have appealed and had no right to habeas corpus. The Court stated:

> "An endeavor is made to magnify the error in these trials to constitutional proportions by asserting that the refusal of the proffered evidence robbed the trial of vitality by depriving defendants of their only real defense. But as much might be said of many rulings during a criminal trial. Defendants received through-

> out an opportunity to be heard and enjoyed all procedural guaranties granted by the Constitution. Error in ruling on the question of law did not infect the trial with lack of procedural due process. * * *'' (332 US at 182)

Turner v. *State of Louisiana*, 379 US 466, 85 S Ct 546, 13 L ed2d 424 (1965), concerned the constitutional effect of misconduct in caring for the jury. This was heard upon certiorari to the state supreme court. The defendant was convicted of murder. The chief deputy sheriff and another deputy were principal witnesses for the prosecution. They testified that the defendant led them to the clip from the murder pistol and made a confession to them. The voluntariness of the confession was an issue and these deputies were crucial witnesses upon this issue. In accordance with Louisiana law, the jury was placed in charge of the sheriff. In fulfillment of this duty these two deputies ''were in close and continual association with the jurors'' for the three days of the trial. The court stated:

> ''It is true that at the time they testified in open court Rispone and Simmons [the two deputies] told the trial judge that they had not talked to the jurors about the case itself. But there is nothing to show what the two deputies discussed in their conversations with the jurors thereafter. * * * We deal here not with a brief encounter, but with a continuous and intimate association throughout a three-day trial—an association which gave these witnesses an opportunity, as Simmons put it, to renew old friendships and make new acquaintances among the members of the jury.'' (85 S Ct at 550)

The Court reversed, holding that the conduct of the trial violated the Fourteenth Amendment.

> ''In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the

> defendant's right of confrontation, or cross-examination, and of counsel. What happened in this case operated to subvert these basic guarantees of trial by jury. * * *" (85 S Ct at 550)

In a broad sense the cases are similar. In the *Turner* case, the jury was exposed to out-of-courtroom influence in the form of constant association with the two key witnesses. In this case one regular juror was exposed to out-of-courtroom influence in the form of overhearing the bailiff express his opinion that the defendant was guilty. While there is the similarity, the difference in degree of the out-of-courtroom influence is so great as to lead us to the conclusion that the bailiff's misconduct did not deprive defendant of a constitutionally correct trial.

The problem here, as it is in civil litigation and in direct criminal appeals, is the balancing of the two desirable objectives,—giving finality to verdicts and protecting jurors from harassment, with another equally desirable objective, guaranteeing a constitutionally fair trial to an accused or any other party. *State* v. *Gardner*, 230 Or 569, 574, 575, 371 P2d 558 (1962).

We have frequently cited and quoted *McDonald* v. *Pless*, 238 US 264, 267-268, 35 S Ct 783, 59 L ed 1300 (1915), on the desirability of the first two above-stated objectives:

> "* * * But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harrassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private delibera-

tion, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.

"• • • And, of course, the argument in favor of receiving such evidence is not only very strong but unanswerable—when looked at solely from the standpoint of the private party who has been wronged by such misconduct. The argument, however, has not been sufficiently convincing to induce legislatures generally to repeal or to modify the rule. For, while it may often exclude the only possible evidence of misconduct, a change in the rule 'would open the door to the most pernicious arts and tampering with jurors.' 'The practice would be replete with dangerous consequences.' 'It would lead to the grossest fraud and abuse' and 'no verdict would be safe.' *Cluggage* v. *Swan*, 4 Binn. 155 [5 Am. Dec. 400]; *Straker* v. *Graham*, 4 M. & W. 721."

Denying a convicted defendant the right to probe a jury verdict for vulnerability is not a denial of due process of law, *United States* v. *Provenzano*, 240 F Supp 393, 412 (D NJ 1965).

In *State* v. *Ausplund*, 86 Or 121, 135, 167 P2d 1019 (1917), the charge was abortion. After the trial, three jurors made affidavits that during deliberations one juror stated that during a recess a neighbor had told him that the defendant had performed abortions on previous occasions. The trial court refused to grant a new trial and upon direct appeal the conviction was affirmed. The decision of the court in effect was that such evidence would not even be received for the reason that it would destroy the finality of the jury's verdict.

In *State* v. *Ausplund*, supra, it was acknowledged that *Clyde Mattox* v. *United States*, 146 US 140, 13 S Ct 50, 36 L ed 917 (1892), was to the contrary. This court believed that decision was greatly limited by the later decision of *McDonald* v. *Pless*, supra. The *Mattox* case in any event

is not controlling here as it was a direct appeal from a federal court and only held that the lower court committed error, not constitutional error.

Trial by jury is the most satisfactory method we have yet devised to determine disputed facts. We know, however, that it is a rough, imperfect instrument, not a precision tool. We know it is influenced by inside prejudices and outside influences, as is any other human institution. Because it is the best procedure we have, we hide its imperfections by granting finality to its verdict. The only exception to such finality is if the imperfection is so apparent and blatant that granting finality would "violate the plainest principles of justice." *McDonald* v. *Pless*, supra, 238 US at 269.

We hold that one juror's overhearing of the bailiff's opinion that the defendant was guilty does not deprive the defendant of a constitutionally fair trial and, therefore, is not a ground for post-conviction relief.

Reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1096-61

LEE E. A. PARKER,

Petitioner,

v.

CLARENCE T. GLADDEN,
Warden of the Oregon State Penitentiary,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1093

LEE E. A. PARKER,

Petitioner,

v.

CLARENCE T. GLADDEN, Warden,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Where a bailiff, who is not a witness, makes statements referring to the accused as "Oh, that wicked fellow, he is guilty," and "If you find him guilty and there is anything wrong, the Supreme Court will correct it," which are overheard by two jurors, but not by the other ten jurors, is due process of law violated if the jury renders an unanimous verdict of guilty and under the Oregon Constitution a verdict is sufficient if ten jurors concur in a verdict of guilty.

STATEMENT

We accept the petitioner's statement of the case, except for the omission of the following material facts which we feel are pertinent to the issue raised.

The Supreme Court of Oregon based its decision on the following facts: "(1) During the trial, the bailiff stated to an alternate juror about the defendant, 'Oh, that wicked fellow, he is guilty.' This was overheard by a regular juror; (2) the bailiff told an unknown juror during the course of the trial, 'If there is anything wrong the Supreme Court will correct it.' This was overheard by two regular jurors . . . ." 407 P. (2d) 246, 247. The regular juror who overheard the first statement was one of the two regular jurors who overheard the second statement.

The post-conviction trial court held that these statements violated the provisions of *Ore. Rev. Stat.* § 17.305 (Appendix) and that if the matters alleged in the post-conviction petition had been called to the trial court's attention, that court on its own motion would have granted the petitioner a new trial. (Petitioner's Brief 3a & 6a)

The issue of the bailiff's misconduct was not raised at the trial, nor was the issue raised on the petitioner's direct appeal of his conviction. It was only after the Supreme Court of Oregon affirmed the petitioner's conviction on the direct appeal, that he had his wife contact members of the jury in an effort to find new grounds for setting aside his conviction. (P.C. Tr. 64-65)

One of the first jurors contacted was a Mrs. Inwards

who told the petitioner's wife that she was willing to discuss the verdict with Mrs. Parker and listen to a tape recording made by the petitioner. (P.C. Tr. 73) As it happened, Mrs. Inwards was the juror who had held out the longest in voting to find the petitioner not guilty. (P.C. Tr. 359) When asked by Mrs. Parker for the names of any other jurors who had taken the position that the petitioner was not guilty, before joining in the unanimous verdict of guilty, Mrs. Inwards gave her the name of Mrs. Drake, another regular juror, and a Mrs. Gattman, an alternate juror, who did not participate in the verdict. (P.C. Tr. 73-74) The reason Mrs. Inwards suggested that Mrs. Parker contact Mrs. Gattman was that she was sure that Mrs. Gattman would be willing to discuss the matter as she had been disappointed in the verdict. (P.C. Tr. 94)

After discussing the matter and listening to the petitioner's tape recorded statement, the women again discussed the matter with the petitioner's attorney and made affidavits alleging various acts of misconduct on the part of the bailiff. (P.C. Tr. 101-103, 168-169) These affidavits provided the basis for the petitioner's post-conviction action.

Mrs. Inwards testified that part of her statement in her affidavit was untrue. (P.C. Tr. 128 & 131) Her testimony was not only impeached by the State, it was also impeached by the petitioner's counsel when he tried to rehabilitate her testimony. (P.C. Tr. 141-143) In fact Mrs. Inwards' testimony at the post-conviction trial borders on being incomprehensible. Likewise, Mrs.

Drake was vague in stating exactly what she had overheard. (P.C. Tr. 166-168) It was only Mrs. Gattman, the alternate juror, who took no part in the deliberation, who was sure of what the bailiff had said. This is because it was her own statement which prompted the bailiff's remark of, "Oh, that wicked fellow, he is going to be - - he is guilty." (P.C. Tr. 174)

There was no evidence that any jurors other than Mrs. Inwards and Mrs. Drake, regular jurors, and Mrs. Gattman, an alternate, heard either of the alleged statements. Ten of the jurors, denied hearing the remark. (P.C. Tr. 192, 204, 211, 222, 231, 247, 257, 267, 272, 306) Even of the two regular jurors who did hear the remark, there is no reliable evidence that it influenced their decision. Mrs. Drake did not testify that it had any effect on her vote. It could not have had any effect on Mrs. Inwards as she was one of the jurors who held out longest on voting for conviction. (P.C. Tr. 359) She at first testified that the remark did not affect her (P.C. Tr. 103, 126, 141), only to change her testimony the next day to state that it did. (P.C. Tr. 355). Almost in the same breath with which she expressed this latter conclusion, she stated that her final vote of guilty had weighed heavily upon her conscience and she would do anything to correct it. (P.C. Tr. 365 & 368)

In reversing the post-conviction trial court, the Supreme Court of Oregon held that the court below had erroneously applied the statutory standard for judging a motion for a new trial. 407 P. (2d) at 247. The Oregon Post Conviction Act (*Ore. Rev. Stat.* § 138.530) (Ap-

pendix) provides that post-conviction relief will be granted when it is established that there was a substantial denial of the petitioner's constitutional rights which would render the conviction void. We would agree that the Oregon Supreme Court then went on to determine that neither the petitioner's federal nor state constitutional rights had been denied. 407 P. (2d) at 248.

It should further be noted that Art. I § 11, of the Oregon Constitution (Appendix) only requires an unanimous jury verdict when the defendant is found guilty of first degree murder. In all other cases it is sufficient if ten members of the jury concur in the verdict of guilty. In this case the undisputed evidence shows that ten members of the jury panel did not hear the bailiff's remarks and the jury returned an unanimous verdict finding the petitioner guilty of second degree murder.

REASONS FOR NOT GRANTING THE WRIT

Contrary to the petitioner's contention, this case is clearly distinguishable from this Court's recent decision in *Turner v. Louisiana*, 379 U.S. 466 (1965).

In *Turner*, this Court held that a defendant was denied his constitutional right to a fair trial where two deputy sheriffs had acted in the dual roles of principal prosecution witnesses and at the same time were responsible for the custody of the jury during the course of the trial. Because of the "continuous and intimate association" between the deputies and the jurors, there existed in *Turner* the possibility that the deputy sheriffs may have related information outside of the courtroom

which affected the jury's verdict. Even if the deputy sheriffs did not discuss the case with the jurors, the jury as a whole was likely to afford greater credibility to the testimony of the deputy sheriffs on the vital question of the voluntariness of the defendant's confession, than they would have, had the jury not been permitted the intimate association with these witnesses during the course of the trial. Under these circumstances, this Court held due process had been denied without the necessity of showing specific prejudice.

Further, in *Turner*, the defendant's counsel made timely motions for a mistrial on the basis that the deputy sheriffs' close association with the jurors had prejudiced the defendant. The issue was again raised on the direct appeal, that the close contact between the two witnesses and the jurors throughout the course of the trial had denied the defendant due process of law as protected by the Fourteenth Amendment.

In the petitioner's case, the bailiff was not a witness at the trial. He was not in a position to know any more about the facts of the case than were the jurors themselves. The statements of the bailiff were not *evidence* and it is unreasonable to conclude that any juror hearing the statements would give any probative value to the bailiff's remarks.

The Supreme Court of Oregon in refusing to permit the two jurors to impeach the jury's verdict, relied upon this Court's decision in *McDonald v. Pless*, 238 U.S. 264, 267 (1915). In that case this Court made the following

statement which is particularly appropriate to the facts in this case:

> ". . . But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference."

The evils of permitting jurors to attempt to impeach their verdict was made convincingly clear at the post-conviction trial in this case. The petitioner was granted a new trial by the post-conviction trial court, not because there was any showing that the petitioner was prejudiced by the bailiff's comments, but because one of the regular jurors and an alternate juror were dissatisfied with the verdict. Since this was a collateral attack, the Supreme Court of Oregon merely refused to set the conviction aside absent any showing of prejudice which would have denied the petitioner his constitutional right to a fair trial by an impartial jury.

The similarity between the *Turner* case and this case is only superficial. There is a vast difference between holding that due process requires that the prosecution not be permitted to have their principal witnesses closely

associate with the jury during the course of the trial, and to state that due process permits a disappointed defendant to seek out jurors in the hope of finding some who are willing to impeach their verdict.

CONCLUSION

The Supreme Court of Oregon was correct in holding that the petitioner had failed to show that there had been a substantial denial of petitioner's constitutional rights in view of the evidence before it.

For the foregoing reason, the writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES

CONSTITUTION OF OREGON, ARTICLE I

Section 11. **Rights of accused in criminal prosecution.** In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor; provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; provided further, that the existing laws and constitutional provisions relative to criminal prosecutions shall be continued and remain in effect as to all prosecutions for crimes committed before the taking effect of this amendment.

OREGON REVISED STATUTES:

17.305. **Deliberations of jury; custody of and communications with jury.** After hearing the charge, the jury may either decide in the jury box or retire for deliberation. If they retire, they must be kept together in a room provided for them, or some other convenient place, under the charge of one or more officers, until they agree upon their verdict or are discharged by the court. The officer shall, to the utmost of his ability, keep the jury together, separate

from other persons, without drink, except water, and without food, except ordered by the court. He must not suffer any communication to be made to them, nor make any himself, unless by the order of the court, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed on. Before any officer takes charge of a jury, this section shall be read to him, and he shall be then sworn to conduct himself according to its provisions to the utmost of his ability.

138.530. **When relief must be granted; executive clemency or pardon powers and original jurisdiction of Supreme Court in habeas corpus not affected.** (1) Post-conviction relief pursuant to ORS 138.510 to 138.680 shall be granted by the court when one or more of the following grounds is established by the petitioner:

(a) A substantial denial in the proceedings resulting in petitioner's conviction, or in the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void.

(b) Lack of jurisdiction of the court to impose the judgment rendered upon petitioner's conviction.

(c) Sentence in excess of, or otherwise not in accordance with, the sentence authorized by law for the crime of which petitioner was convicted; or unconstitutionality of such sentence.

(d) Unconstitutionality of the statute making criminal the acts for which petitioner was convicted.

(2) Whenever a person petitions for relief under ORS 138.510 to 138.680, ORS 138.510 to 138.680 shall not be construed to deny relief where such relief would have been available prior to May 26, 1959,

under the writ of habeas corpus, nor shall it be construed to affect any powers of executive clemency or pardon provided by law.

(3) ORS 138.510 to 138.680 shall not be construed to limit the original jurisdiction of the Supreme Court in habeas corpus as provided in the Constitution of this state.

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No. 1093

Supreme Court of the United States

OCTOBER TERM, 1965

LEE E. A. PARKER, *Petitioner,*

v.

CLARENCE T. GLADDEN, Warden of Oregon State Penitentiary, *Respondent.*

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

By referring to Art. I, Sec. 11 of the Oregon Constitution, which allows ten members of the jury to render a guilty verdict, respondent seeks to avoid the holding of *Turner* v. *Louisiana,* 379 U.S. 466 (1965), that prejudice need not be shown to void a conviction for misconduct of the sort involved here.

Respondent can see no difference between a jury two of whose members have been subjected to outside influence and a jury two of whose members simply disagree with the verdict. This view plainly has nothing to do with the realities of how twelve people interact to reach a verdict—a conclusion reinforced by

the fact that the jury in this case deliberated for 26 hours. Under these circumstances "it would be blinking reality not to recognize the extreme prejudice" resulting from the misconduct of the bailiff. See *Turner* v. *Louisiana,* 379 U.S. at 473.

The precise situation arose in *State* v. *Murray,* 164 La. 883, 114 So. 721 (1927), where a conviction was reversed because of outside influence exerted on two jurors to convict. The court disposed of the same contention advanced here with these words:

> "It is argued that no harm was done by the deputies in this case, because nine of the jurors testified that the deputies did not attempt to influence their judgment, and because at least ten, and more likely eleven, of the jurors voted to convict the defendant, when the concurrence of only nine was enough to convict. There is some logic in the argument, but it overlooks the fact that, notwithstanding the defendant could be legally convicted by the unfavorable vote of nine as well as of twelve jurors, he was entitled to be tried by twelve—not nine or ten or eleven, but twelve—impartial and unprejudiced jurors." (114 So. at 723).

The same rule has been followed in civil cases not requiring unanimous jury verdicts, *Piehler* v. *Kansas City Public Service Co,* 357 Mo. 866, 211 S.W. 2d 459 (1948) (participation of one biased juror voids unanimous verdict, even though three-fourths verdict authorized), and in cases involving administrative agencies. *Texaco, Inc.* v. *Federal Trade Comm.* 118 U.S. App. D.C. 366, 336 F. 2d 754 (1964) (participation of biased Commissioner amounts to denial of due process); *Piggott* v. *Borough of Hopewell,* 22 N.J. Super. 106, 91 A. 2d 667 (1952) (zoning board); *Daly* v. *Town Plan*

& Zoning Comm., 150 Conn. 495, 191 A. 2d 250 (1963) (zoning board).

Respondent's makeweight argument cannot support a conviction and sentence of life imprisoment based on the blatant misconduct established in this case.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 81

LEE E. A. PARKER,

Petitioner,

vs.

CLARENCE T. GLADDEN, Warden of the Oregon State Penitentiary,

Respondent.

BRIEF FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 81

LEE E. A. PARKER,

Petitioner,

vs.

CLARENCE T. GLADDEN, Warden of the Oregon State Penitentiary,

Respondent.

BRIEF FOR PETITIONER

Petitioner prays that this Court reverse the judgment of the Supreme Court of Oregon in the above-entitled case.

Citations to Opinions Below

The opinion of the post-conviction hearing court (Circuit Court of Multnomah County), unreported, is printed in the Record at page 194. The opinion of the Supreme Court of Oregon, —— Ore. ——, 407 P.2d 246 (1965), is printed in the Record at page 203.

Jurisdiction

The judgment of the Supreme Court of Oregon was entered on November 3, 1965. A timely petition for rehearing was denied on December 7, 1965. The certiorari

jurisdiction of this Court was invoked under 28 U.S.C. § 1257(3), and a writ of certiorari was granted by this Court on April 18, 1966.

Constitutional Provisions Involved

Amendment 6 of the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Amendment 14, Section 1, of the United States Constitution provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2

Question Presented

Where the bailiff in charge of the jury during defendant's murder trial told jurors "Oh that wicked fellow, he is guilty," and "If you find him guilty and there is anything wrong, the Supreme Court will correct it," did defendant's conviction and sentence to life imprisonment violate due process?

Statement

Petitioner seeks reversal of a decision of the Supreme Court of Oregon which denied post-conviction relief under a statute directing such relief when there has been a "substantial denial . . . of petitioner's rights under the Constitution of the United States."* The decision of the Supreme Court of Oregon reversed a decision of the Circuit Court of Multnomah County, which had granted a new trial because of its finding of fact (accepted by the Supreme Court of Oregon) that the bailiff in charge of the jury told members of the jury: "Oh that wicked fellow, he is guilty," and "If you find him guilty and there is anything wrong, the Supreme Court will correct it." Record 197.

Petitioner Lee Parker was convicted of second-degree murder on May 18, 1961, and sentenced to life imprison-

---

* O.R.S. § 138.530(1)(a):

"(1) Post-conviction relief pursuant to ORS 138.510 to 138.680 shall be granted by the court when one or more of the following grounds is established by the petitioner:

"(a) A substantial denial in the proceedings resulting in petitioner's conviction, or in the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void."

ment. *Affirmed*, 235 Ore. 366, 384 P.2d 986 (1963).* Petitioner then filed a petition for post-conviction hearing and relief, alleging, among other things, that he had been denied a fair trial in accordance with due process of law by the misconduct of the bailiff in "discussing the case directly with the jurors," and "passing on the guilt of the petitioner to the jurors during trial." Record 3.

At a hearing before the Circuit Court of Multnomah County, three women—two regular jurors and an alternate juror—testified that they had heard the bailiff make the statements quoted above. Record 17-20, 30, 42-45, 51-54, 60-61, 63-64, 180, 187-90 (Mrs. Inwards); Record 65-66, 76 (Mrs. Drake); Record 79-80, 83-85 (Mrs. Gattman). The two regular jurors also testified that one of the bailiff's statements quoted above was made in the presence of an additional, unidentified juror (probably a man). Record 18, 30, 52-53, 63-64, 65-66, 76. Nine regular jurors and the other alternate juror testified they had not heard the bailiff make the statements quoted. Record 90-136, 150-54.** The bailiff testified he could not remember making the statements quoted. Record 157-61, 167-68, 171-72.

Based on this record, the hearing court found as a fact that the bailiff had made the statements quoted above. Record 197. Noting that the trial had lasted eight days, during which there was opportunity for close association between the jurors and the bailiffs assigned to the trial,†

---

* This was petitioner's second trial. His first conviction, in 1958, had been reversed by the Supreme Court of Oregon on grounds unrelated to the present petition. 225 Ore. 88, 356 P.2d 88 (1960).

** The twelfth regular juror did not testify at the post-conviction hearing because the State had not been able to serve her with a subpoena. (Original Transcript 88-89 [not printed].)

† The jury was sequestered during the entire trial. Record 136-39.

and that the jury had deliberated twenty-six hours, Record 197-98, the court held "that the unauthorized communication was prejudicial and that such conduct materially affected the rights of the defendant." Record 199. The court accordingly ordered a new trial for the defendant.

The State appealed to the Supreme Court of Oregon, which accepted the facts as found by the post-conviction trial court, and held that the issue of the bailiff's misconduct was timely raised because it could not reasonably have been raised on appeal. The Supreme Court held, however, that these facts did not result in denying petitioner a "constitutionally fair trial."

The federal question involved in this case arises by the terms of the statute under which petitioner proceeded, O.R.S. § 138.530, which directs relief where federal constitutional rights have been denied. The decision of the Supreme Court of Oregon necessarily passed on this federal question, as indicated by that court's statement of the question to be decided:

> "The question we have is whether the bailiff's conduct, found by the trial court to be error and prejudicial to the petitioner's cause, amounts to a substantial denial of petitioner's rights under the Constitutions of the United States or Oregon." [—— Ore. ——, 407 P.2d at 248 (1965).]

Summary of Argument

The facts of this case are not in dispute. They show the most elementary denial of rights guaranteed by the Fourteenth Amendment. A person has been convicted of murder by the State of Oregon and sentenced to life im-

prisonment after a trial in which he was denied two essential elements of a fair trial: the right to confront his accusers, and the right to trial by a jury free from out-of-court influence. The holding of the Supreme Court of Oregon that such a trial and conviction are consistent with the basic guarantees of the Fourteenth Amendment is in square conflict with decisions of this Court.

ARGUMENT

I. The Trial Accorded Petitioner by the State of Oregon Violated His Federal Constitutional Rights in Two Fundamental Particulars.

It is established that during the course of petitioner's trial for murder, an officer of the State of Oregon, having custody of the jury and being in intimate contact with it throughout the trial, expressed to several of the jurors his conviction that petitioner was guilty as charged and further that the jurors need not fulfill their office to the best of their ability and conscience because the courts would give petitioner relief from any wrongful conviction. All this was, of course, outside of the courtroom and unknown to petitioner and to the trial judge. That it occurred is not now disputed by the State.

The decision of the court below endorsing a conviction secured in these circumstances denies petitioner's right to confront his accusers and his right to be tried by a jury uninfluenced by prejudicial out-of-court events—two fundamental rights inherent in our concept of a fair trial.

Only last year this Court reversed a state conviction where both these rights were similarly violated, though not so clearly as here. In *Turner* v. *Louisiana*, 379 U.S.

466, two deputy sheriffs who were prosecution witnesses also served as jury bailiffs. The decision of this Court was based on the ground that a prejudicial atmosphere was created by the two deputies being in constant contact with the jurors throughout the trial, and that—despite the State's denials—there *may have been* things said to the jurors out of court which related to the merits of the case. In holding that the mere "potentialities of what went on outside the courtroom" rendered the conviction void, this Court said:

> "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." [379 U.S. at 472-73.]

Whereas in *Turner* there was no proof that there was any "evidence developed" against the accused off the witness stand, in the present case just such an occurrence is established by uncontested findings of fact. Moreover, the influence of Oregon's bailiff in the present case was probably greater than what occurred in *Turner* because the bailiff was not identified as a prosecution witness—as the deputies in *Turner* had been—and there was no attack on his credibility—as there had been in *Turner*. The jurors could well have believed that Oregon's bailiff—an unimpeached, and indeed unchallenged, state official—had access to information denied them by "technical" rules of evidence.* Compare *Marshall* v. *United States*, 360 U.S. 310, 312-13.

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* Information derived from petitioner's first trial, for example.

This Court has recently held that the Sixth Amendment right of an accused to confront and cross-examine the witnesses against him is a fundamental right secured by the Fourteenth Amendment against impairment by the States. *Pointer* v. *Texas*, 380 U.S. 400. In *Pointer* a witness who had testified at a preliminary hearing at which defendant had not been represented by counsel died before trial. At the trial the transcript of this pre-trial testimony was admitted into evidence and this Court held the use of evidence untested by cross-examination denied "one of the fundamental guarantees of life and liberty," quoting *Kirby* v. *United States*, 174 U.S. 47, 55. Obviously this fundamental feature of a fair trial is violated when Oregon permits one of its state officers in effect to testify secretly to the jurors that in his judgment petitioner is guilty. This kind of inflammatory opinion statement would not have been admissible if offered from the witness stand. Clearly the Fourteenth Amendment prohibits the states from securing a conviction where such a statement is made outside of the courtroom and without the essential protection of cross-examination.

This Court has also had frequent occasion in recent years to reaffirm the other fundamental feature of a fair trial which the decision below violates: the right to a jury isolated as far as possible from potentially prejudicial out-of-court influence. The basic principle involved was expressed by Justice Holmes in *Patterson* v. *Colorado*, 205 U.S. 454, 462:

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

Only last term this Court identified the principle discussed by Justice Holmes as an "undeviating rule." *Sheppard* v. *Maxwell*, 384 U.S. 333, 351.

The constitutionality of trial before a jury exposed to extrajudicial influence was extensively discussed in *Irvin* v. *Dowd*, 366 U.S. 717:

> "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 U.S. 257; *Tumey* v. *Ohio*, 273 U.S. 510. 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison*, 349 U.S. 133, 136. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson* v. *City of Louisville*, 362 U.S. 199. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807). 'The theory of the law is that a juror who has formed an opinion cannot be impartial.' *Reynolds* v. *United States*, 98 U.S. 145, 155." [366 U.S. at 722.]

More recently, this Court has reversed convictions in *Rideau* v. *Louisiana*, 373 U.S. 723, and *Sheppard* v. *Maxwell*, 384 U.S. 333, because of widespread publicity creat-

ing an "environing atmosphere" of guilt.* See also *Estes* v. *Texas*, 381 U.S. 532. Cases dealing with the general out-of-court influence on juries do not present the direct and immediate jury impact that is presented in this case where an officer of the state communicated directly to the jurors his opinion of guilt.

Whether the misconduct here is viewed as a problem of jury consideration of material untested by confrontation and cross-examination, or a problem of out-of-court influence upon juries, it is clear, as in *Turner*, that "what happened in this case operated to subvert [the] basic guarantees of trial by jury." 379 U.S. at 473.

II. The Constitutional Infringement Shown Here Cannot Be Justified on Any Adequate Grounds.

In many instances individual rights under the Constitution are defined by reference to other legitimate interests of society at large. But here the State can suggest no adequate reason why its officers should be allowed secretly to inform juries that criminal defendants are, in their opinion, guilty.

The Supreme Court of Oregon did not attempt to justify the treatment accorded petitioner by reliance on any countervailing considerations, tacitly admitting that there are none. It accepted the facts (including the post-conviction court's finding of prejudice); it acknowledged its own rule requiring it to question and set aside a jury verdict wherever the plainest principles of justice demand it;**

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* *Frank* v. *Mangum*, 237 U.S. 309, 349 (dissenting opinion of Holmes, *J.*).

** The Supreme Court of Oregon cited its recent case of *State* v. *Gardner*, 230 Ore. 569, 371 P.2d 558 (1962), where an ex-

it explicitly acknowledged petitioner's federal constitutional claim; and it recognized the similarity between this case and *Turner* v. *Louisiana*. Nonetheless, the Supreme Court of Oregon held that the prejudicial error found in this case "does not deprive the defendant of a constitutionally fair trial." Record 210. This question, however, is always one for final determination by this Court, and there can be no doubt in this case that reversal is required.

The prosecution has suggested in its brief in opposition to the petition for a writ of certiorari that the decision below can be supported on the ground that no prejudice was shown, but this contention runs afoul of both facts and law. As to the facts, the post-conviction hearing court found "that the unauthorized communication was prejudicial and that such conduct materially affected the rights of the defendant." In finding prejudice, the hearing court considered the fact that the issues were complex enough to require an eight-day trial, and specifically referred to the fact that the jury had required twenty-six hours to reach a verdict. This finding of prejudice was not upset by the Supreme Court of Oregon. In any event, the law is perfectly clear—at least after *Estes*, *Sheppard*, and *Turner*—that proof of actual prejudice is not a precondition to the assertion of the right to a fair trial when, as here, the

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haustive review of the cases showed the Oregon rule to be that "a verdict is impeachable if justice demands that it be set aside." 230 Ore. at 573-74, 371 P.2d at 560. Compare *State* v. *Kociolek*, 20 N.J. 92, 118 A.2d 812 (1955), summarizing cases from many jurisdictions to show a general accord in favor of this rule.

Even if there were a rule, which Oregon does not have, prohibiting receipt of evidence to impeach a verdict, this rule would have no application to a case of misconduct committed by someone other than a juror. Nor, of course, could such a general rule of evidence insulate a conviction from an attack based on federal constitutional claims.

"procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes* v. *Texas*, 381 U.S. at 542-543. Even more obviously than in *Turner*, "it would be blinking reality not to recognize the extreme prejudice inherent" in permitting the type of testimonial statements by a state officer that Oregon has sanctioned in this case. *Turner* v. *Louisiana*, 379 U.S. at 473. *Accord, Rideau* v. *Louisiana, supra; Irvin* v. *Dowd, supra; Marshall* v. *United States, supra.*

Oregon's prosecutors' claim of no prejudice seems to be based on a theory that no harm was done because ten members of the jury testified they had not heard the bailiff's statements, and Article 1, Section 11 of the Oregon Constitution allows ten members of the jury to render a guilty verdict. Respondent's view plainly has nothing to do with the way the twelve people of a jury interact in order to reach a verdict.*

The State's makeweight argument was sufficiently answered by the Supreme Court of Louisiana when it reversed a conviction in circumstances identical to those shown here:

> "It is argued that no harm was done by the deputies in this case, because nine of the jurors testified that the deputies did not attempt to influence their judgment, and because at least ten, and more likely eleven, of the jurors voted to convict the defendant, when the concurrence of only nine was enough to convict. There is some logic in the argument, but it overlooks the

---

* This argument also ignores the testimony that a third, unidentified regular juror heard one of the prejudicial statements. Record 18, 30, 52-53, 63-64, 65-66, 76. See also Record 204.

fact that, notwithstanding the defendant could be legally convicted by the unfavorable vote of nine as well as of twelve jurors, he was entitled to be tried by twelve—not nine or ten or eleven, but twelve—impartial and unprejudiced jurors." [*State* v. *Murray*, 164 La. 883, 887, 114 So. 721, 723 (1927).]*

Conclusion

For the foregoing reasons, the judgment of the Supreme Court of Oregon should be reversed, and the case remanded to that court for proceedings not inconsistent with the opinion of this Court.

Respectfully submitted,

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* See *Pichler* v. *Kansas City Public Service Co.*, 357 Mo. 866, 211 S.W. 2d 459 (1948); *Texaco, Inc.* v. *Federal Trade Comm.*, 118 U.S. App. D.C. 366, 336 F.2d 754 (1964); *Piggott* v. *Borough of Hopewell*, 22 N.J. Super. 106, 91 A.2d 667 (1952); *Daly* v. *Town Plan & Zoning Comm.*, 150 Conn. 495, 191 A.2d 250 (1963).

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BRIEF FOR RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 81

LEE E. A. PARKER,

Petitioner,

v.

CLARENCE T. GLADDEN, Warden,

Respondent.

BRIEF FOR RESPONDENT

Respondent prays that this Court affirm the judgment of the Supreme Court of Oregon in the above entitled case.

CITATIONS TO OPINIONS BELOW

The opinion of the post-conviction hearing court (circuit court of Multnomah County), unreported, is printed in the Record at page 194. The opinion of the Supreme Court of Oregon, — Ore. —, 407 P.2d 246 (1965), is printed in the Record at page 203.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of Oregon, Article I, Section 11, provides:

"In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury

in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him; and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor; provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; provided further, that the existing laws and constitutional provisions relative to criminal prosecutions shall be continued and remain in effect as to all prosecutions for crimes committed before the taking effect of this amendment."

OREGON REVISED STATUTES § 17.305 provides:

"*Deliberations of jury; custody of and communications with jury.* After hearing the charge, the jury may either decide in the jury box or retire for deliberation. If they retire, they must be kept together in a room provided for them, or some other convenient place, under the charge of one or more officers, until they agree upon their verdict or are discharged by the court. The officer, shall, to the utmost of his ability, keep the jury together, separate from other persons, without drink, except water, and without food, except ordered by the court. He must not suffer any communication to be made to them, nor make any himself, unless by the order of the court, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed on. Before any officer takes

charge of a jury, this section shall be read to him, and he shall be then sworn to conduct himself according to its provisions to the utmost of his ability."

OREGON REVISED STATUTES § 138.530 provides:

"When relief must be granted; executive clemency or pardon powers and original jurisdiction of Supreme Court in habeas corpus not affected. (1) Post-conviction relief pursuant to ORS 138.510 to 138.680 shall be granted by the court when one or more of the following grounds is established by the petitioner:

(a) A substantial denial in the proceedings resulting in petitioner's conviction, or in the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void.

(b) Lack of jurisdiction of the court to impose the judgment rendered upon petitioner's conviction.

(c) Sentence in excess of, or otherwise not in accordance with, the sentence authorized by law for the crime of which petitioner was convicted; or unconstitutionality of such sentence.

(d) Unconstitutionality of the statute making criminal the acts for which petitioner was convicted.

(2) Whenever a person petitions for relief under ORS 138.510 to 138.680, ORS 138.510 to 138.680 shall not be construed to deny relief where such relief would have been available prior to May 26, 1959, under the writ of habeas corpus, nor shall it be construed to affect any powers of executive clemency or pardon provided by law.

(3) ORS 138.510 to 138.680 shall not be construed to limit the original jurisdiction of the Supreme Court in habeas corpus as provided in the Constitution of this state."

QUESTION PRESENTED

Where a bailiff who is not a witness, allegedly makes statements referring to the accused as, "Oh, that wicked fellow, he is guilty," and "If you find him guilty and there is anything wrong, the Supreme Court will correct it," which are overheard by two jurors but not the other ten jurors and no prejudice is shown, is due process of law violated if finality is given the jury verdict?

STATEMENT

We accept the petitioner's statement of the case except for the omission of the following material facts which we feel are pertinent to the issue raised.

Petitioner was convicted of second degree murder on May 19, 1961, in the Multnomah County Circuit Court and was sentenced to the Oregon State Penitentiary for an indeterminate period of time, the maximum of which was the remainder of his natural life. (Record 2) Petitioner filed an appeal and the conviction was affirmed on September 5, 1963. 235 Ore. 366, 384 P.2d 986 (1963). Petitioner then filed a petition for rehearing on the appeal. This was denied October 8, 1963. *Id.*

Several months after his conviction in 1961, petitioner wrote a letter, dated September 7, 1961, to several of the jurors. (Record 32, 100, 105, 116, 119, 132) The contents of this letter mildly chastised the members of the jury, played on their sympathies and expressed petitioner's

displeasure with the verdict. (Appendix A) No further effort was made to contact the jurors until after the Oregon Supreme Court affirmed the petitioner's conviction. At this time petitioner furnished his wife with a tape recording and requested that she contact members of the jury in an effort to find new grounds for setting aside his conviction. (Record 16)

In response to petitioner's request Mrs. Parker, in October 1963, initiated the events which led to the filing of the amended petition for post conviction relief. (Record 11) The amended petition for post conviction relief was subsequently filed, and the hearing was held on June 22, 1964. (Record 10)

Mrs. Parker secured the names of the jurors and without previous knowledge that the jurors had any information on the issues presented here, contacted two of the regular jurors. (Record 12-13, 104) One juror, Mrs. Inwards, the juror who held out the longest in voting to find the petitioner not guilty (Record 183), told petitioner's wife that she would be willing to listen to the tape recording. (Record 21) In response to an inquiry by Mrs. Parker, as to who had held out the longest, Mrs. Inwards furnished the names of Mrs. Drake, a regular juror, and Mrs. Gattman, an alternate juror who did not participate in the verdict. (Record 21) Mrs. Inwards suggested that Mrs. Parker contact Mrs. Gattman because she was sure Mrs. Gattman would be willing to

discuss the matter as she had been disappointed in the verdict. (Record 31)

These three women, Mrs. Inwards, Mrs. Drake and Mrs. Gattman, discussed the matter and listened to the petitioner's tape recording in Mrs. Parker's home. (Record 13, 33, 36, 77, 83) The tape recording, among other items, asked questions about the same matters stated to have been seen or heard by these women in their affidavits. (Record 34) The tape recording may have been in Mrs. Parker's possession during the post conviction hearing (Record 16), but it was not produced as evidence nor accounted for during this hearing. The affidavits which resulted from these discussions provided the basis for petitioner's post conviction action.

Mrs. Inwards testified that part of her statement in the affidavit was untrue. (Record 52-55) Her testimony was not only impeached by the State, it was also impeached by petitioner's counsel when he tried to rehabilitate her testimony. (Record 58-59) Mrs. Inwards further testified that none of the incidents stated in her affidavit affected her verdict in any way. (Record 36-38, 40, 51, 62) She later stated the remarks could have affected her decision. (Record 180-181) However, she testified she also was so upset over the verdict that she would do anything to correct it. (Record 187, 189)

Mrs. Drake, the other regular juror was vague in stating exactly what she had overheard (Record 74-76),

yet she testified to the exact version of the remark which Mrs. Inwards repudiated as not being true. (Record 76)

It was only Mrs. Gattman, the alternate juror who took no part in the deliberations, who was sure of what the bailiff had said. It was her own statement which prompted the bailiff's remark "Oh, that wicked fellow, he is going to be . . . he is guilty." (Record 80, 85) Mrs. Gattman freely admitted that she was disturbed over the verdict (Record 78, 85) yet she made no effort to notify anyone of the bailiff's remark until after the trial. (Record 83, 85)

There is no evidence that any juror other than Mrs. Inwards and Mrs. Drake, both regular jurors, and Mrs. Gattman, an alternate, heard either of the alleged statements. Nine of the regular jurors and the one other alternate juror denied hearing the remark. (Record 86, 91, 95, 102, 106, 111, 117, 123, 129, 132, 152) Mrs. Drake, Mrs. Inwards and Mrs. Gattman did not discuss these alleged remarks prior to being contacted by Mrs. Parker, either among themselves, with the judge or with the other jurors. (Record 83, 186) The bailiff who allegedly made these remarks failed to corroborate them, rather he denied having discussed the case with any juror, regular or alternate. (Record 157-161, 165-168) The alleged remarks upon which the Supreme Court of Oregon based its decision are as follows: The remark, "Oh, that wicked fellow . . . , he is guilty" was allegedly made to

the alternate juror, Mrs. Gattman. (Record 80, 85) and was overheard by a regular juror, Mrs. Inwards. (Record 30, 43) The other remark, "If there is anything wrong the Supreme Court will correct it," was allegedly made to a man or woman juror not identified (Record 52) and was allegedly overheard by both regular jurors, Mrs. Drake, (Record 76) and Mrs. Inwards. (Record 30, 52) 407 P.2d 246, 247. The unidentified juror was never called to testify in the post conviction hearing or if present did not corroborate the alleged remark.

The post conviction trial court held that these statements violated the provisions of *Ore. Rev. Stat.* § 17.305 (Record 195), and that if the matter alleged in the post conviction petition had been called to the trial court's attention, that court on its own motion would have granted petitioner a new trial. (Record 199)

In reversing the post conviction trial court, the Supreme Court of Oregon held that the court below had erroneously applied the statutory standard for judging a motion for a new trial. 407 P.2d at 247.

The Oregon Post Conviction Act (*Ore. Rev. Stat.* § 138.530) provides that post conviction relief will be granted when it is established that there was a substantial denial of the petitioner's constitutional rights which would render the conviction void. The Oregon Supreme Court determined that neither the petitioner's federal nor state constitutional rights had been denied. 407 P.2d at 248.

SUMMARY OF ARGUMENT

The evil of permitting jurors to attempt to impeach their verdict was made convincingly clear at the post conviction trial in this case. Through the use of letters, phone calls, a tape recorder, personal contact, and group discussions over a period of time, the petitioner was able to secure from the jurors, certain affidavits alleging defects in his trial.

This type of post trial conduct by a convicted defendant has not been sanctioned by this Court in the past, nor should it be sanctioned in the future. The integrity of the jury proceeding must not be jeopardized by unauthorized invasions of this nature. A juror must be free to exercise his function without the continuing threat of a future investigation and subsequent interrogation. The privilege of being a juror should not carry with it the loss of personal privacy at a later date.

Granting finality to a jury verdict is the only method which will insure the free exercise of discretion on the part of the jurors. It will also protect jury members, when they resume the role of private citizen, from harassment and intimidation from disgruntled jurors as well as disappointed litigants. The impact of any other policy towards the finality of the jury verdict will render the jury system subject to undesirable outside pressures. The result will surely be the destruction of the secrecy necessary to our system of justice.

The harmless, inconsequential remarks allegedly made by the bailiff did not prevent the petitioner from receiving a fair trial. These remarks were not substan-

tiated by the bailiff, nor were they communicated to the other jurors. None of the three jurors involved manifested any prejudice towards the petitioner. The three women jurors were those most sympathetic to the petitioner's cause. Because no prejudice can be shown, there has been no denial of petitioner's constitutional rights. There is no reason to set the verdict aside.

ARGUMENT

I—PUBLIC POLICY REQUIRES THAT FINALITY BE ACCORDED A JURY VERDICT

The implication of petitioner's argument if accepted by this court would render every jury verdict subject to re-opening at a later date. The present facts offer a clear and convincing example of the post trial harassment discussed in *Stein v. People,* 346 U.S. 156 (1953).

The petitioner contacted the jurors by letter several months after the penalty trial. (Record 32, 100, 105, 116, 119, 132) This letter expressed displeasure with the verdict and implied that the jury members were victims of an unfair judicial system. (Appendix A) No further contact was made with the jurors until petitioner's conviction was affirmed on appeal. Immediately after the affirmance, Mrs. Parker contacted two regular jurors and one alternate juror. (Record 12-13, 104) The three women jurors were then subjected to a "discussion" with petitioner's wife and petitioner's attorney. Prior to meeting with the attorney these three women jurors listened to a tape recording by petitioner, in which the same general

subject matter was discussed as appeared in their affidavits. (Record 13, 33, 34, 36, 77, 83) The fact that none of these incidents or remarks was brought to the attention of the trial court, the other jury members, or any attorney or other officer of the court prior to the contact of the jurors by Mrs. Parker leads to the inescapable conclusion that the three women jurors were "brain washed" over the six months period of time before the affidavits were made.

This court has not favored any public or private post trial inquisition of jurors. The question of post trial intimidation and harassment of jurors was discussed in *Stein v. People*, 346 U.S. 156, 178, wherein this court said:

> " 'If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.' *McDonald v. Pless* supra, 238 US at pages 267-268, 35 US Ct at page 784."

The reasons for preventing this type of jury harassment are stated in *United States v. Crosby*, 294 F.2d 928, 950, (C.A.2 1961):

> "There are many cogent reasons militating against post-verdict inquiry into jurors' motives for decision. The jurors themselves ought not be subjected to harassment; the courts ought not be burdened with large numbers of applications mostly without real merit; the chances and *temptation for tampering ought not be increased;* verdicts ought not be made so uncertain. * * *" (Emphasis supplied)

This reasoning has as a valid object, the preservation of final jury determinations and ultimately the protection of the sanctity of the jury process. See *Castaldi v. United States*, 251 F. Supp. 681 (E.D. Mo. 1966) and *United States v. Procario*, 356 F.2d 614 (C.A.2 1966) (U.S. appeal pending). The protection of the jurors from invasions of their home, professional and private life by dissatisfied litigants will be non-existent if harassment of this nature and magnitude is condoned. In addition if the court opens up the jury to investigation and post trial interrogation of this nature, the secrecy necessary to the deliberative process will be destroyed. This is shown by the following from *Clark v. United States*, 289 U.S. 1, 13 (1932):

> "* * * Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world. * * *"

Calling back jurors for post trial interrogation after they have been discharged is an extraordinary procedure. In this instance authorizing a delay of two years after the penalty trial will be an open invitation to jury tampering by disgruntled jurors as well as disappointed litigants. The jury loses its identity after it is discharged. *State ex rel. D'Andrea v. Smith*, 183 So.2d 34 (Fla. 1966). Each individual serving as a juror will be subject to harassment as a private citizen, not as a juror. This certainly is an unreasonable and unnecessary burden to place on the privilege of being a juror. See *State v. Athorn*, 46 N.J. 247, 216 A. 2d 369 (1966).

This is summed up in the oft quoted decision of *McDonald v. Pless,* 238 U.S. 264, 268 (1915):

> "* * * For, while it may often exclude the only possible evidence of misconduct, a change in the rule 'would open the door to the most pernicious arts and tampering with jurors.' 'The practice would be replete with dangerous consequences.' 'It would lead to the grossest fraud and abuse,' and 'no verdict would be safe.' * * *"

Denying a convicted defendant the right to probe a jury verdict for vulnerability is not a denial of due process of law. *United States v. Provenzano,* 240 F. Supp, 393, 412, (D. N.J. 1965).

The Supreme Court of Oregon recognized that public policy considerations demanded that finality be given to a jury verdict. This case was decided on an adequate state ground in order to maintain this public policy. The Oregon Supreme Court said:

> "Trial by jury is the most satisfactory method we have yet devised to determine disputed facts. We know, however, that it is a rough imperfect instrument, not a precision tool. We know it is influenced by inside prejudices and outside influences, as is any other human institution. Because it is the best procedure we have, we hide its imperfections by granting finality to its verdict." 407 P.2d 246, 250.

II—THE EVIDENCE SUPPORTING PETITIONER'S ALLEGATIONS IS TOO INSUBSTANTIAL TO IMPUTE PREJUDICE TO THE JURY.

The main thrust of this inquiry is whether there has been an effect on the substantial rights of the petitioner.

We are not concerned with the selection of a jury, nor with pre-trial publicity, nor with an "environing atmosphere" of guilt. We are here concerned with the effect of an alleged remark on one or two members of a duly constituted jury. For this reason the cases cited by petitioner as the standard required of a jury trial are inapplicable. The decisions *Rideau v. Louisiana*, 373 U.S. 723 (1963) (wherein blatant and strong adverse publicity made prejudice inherent); *Sheppard v. Maxwell*, 384 U.S. 333 (1965) (an "environing atmosphere" of guilt) and *Irvin v. Dowd*, 366 U.S. 717 (1961) (entire jury infected prior to trial with prejudice) all deal with out of court influences which is not the fact situation presented here. *Turner v. Louisiana*, 379 U.S. 466 (1965) presented a constant continuous association and supervision of the jury by important prosecution witnesses. Every single juror in *Turner* was subjected to prolonged intimate contact with these witnesses with the knowledge of the trial court. This is clearly not the case here. The present facts reveal at most, an accidental blurting out, without trial court knowledge, of two statements to two regular jurors and one alternate juror. There was no showing that either of these remarks was overheard by nine of the regular jurors and the other alternate juror (Record 86, 95, 102, 106, 111, 117, 123, 129, 132, 152). In fact the juror that held out the longest against conviction stated she was not influenced in her decision by the remarks. (Record 36-38, 40, 51, 62) She later revised her testimony, and said it could have affected her decision. (Record 180-181) The other regular juror was so vague and equivocal

in her testimony that doubt is placed on the effect, if any, these remarks had on her decision. (Record 74-76)

Though these alleged remarks may be presumed prejudicial, *Remmer v. United States*, 347 U.S. 277 (1954), actual prejudice is necessary before the verdict may be overturned. *Irvin v. Dowd, supra; Beck v. Washington*, 369 U.S. 541 (1962). The hearing required by *Remmer* to determine prejudice was conducted. On review of this hearing, these remarks were adjudged not prejudicial to the petitioner. 407 P.2d (1965). In view of the contradictions of the two regular jurors and the one alternate, and the fact that both regular jurors testified they were not affected by the remarks, (Record 36-38, 40, 51, 62) there was no actual prejudice. Surely the presumption of prejudice is not equated with actual prejudice. The opportunity for prejudice existed but the equivocal testimony in the record reveals it to be mere speculation as to whether it actually existed. As Mr. Justice Holmes said in *Holt v. United States*, 218 U.S. 245 (1910):

> "* * * If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day. * * *"

The contact in this case does not reach the level condemned in *Turner*. No confidence was shown to have been placed in the bailiff's remark; he was not instrumental to the prosecution of the case. The effect of two inconsequential remarks, during an eight day trial, is minimal at most. Especially since the petitioner's key witness, Mrs. Inman, could only testify equivocally that the remark "could have affected her decision". (Record

180) See *Guillory v. State*, 400 SW2d 751 (Tex. 1966). Without a clear showing of prejudice because of this communication there is no need for a new trial. *Remmer v. United States, supra. United States ex rel. Moore v. Fay*, 238 F. Supp. 1005 (S.D. N.Y. 1965); *Beck v. Washington, supra.*

CONCLUSION

Two and one-half years after the Oregon jury rendered its verdict in petitioner's criminal case, petitioner managed to upset that verdict by a process of personal interviews, tape recordings, letters, and, other persuasive tactics on pliable jurors.

The Oregon State Supreme Court confronted with this record and the bailiff's remarks, held that the public policy considerations requiring the giving of finality to jury verdicts outweighed any possible prejudice that could be inferred from the remarks made by the bailiff.

In view of the equivocal record which failed to show actual prejudice, we submit that the Supreme Court of Oregon was justified in giving finality to the jury verdict.

Respectfully submitted,

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APPENDIX A

No. 300-600
Dft. Exh. 5
Sulmonetti, Judge
C. Cusick, Clerk
Rec'd

Dear Mr. George V. Kolibaba

It has come to my attention that various members that served on the jury at my trial tend to feel somewhat upset regarding the verdict they returned. Being the princkple (sic) pers_n (/) at this proceedings, I of all persons can well understand and appreciate your position. I have had much time in which to dwell on all aspedts (sic) of my case, and to analyze the outcome. Had I, my mother, or any of my family been called upon to serve as possible under the pressing procedures involving the despensation (sic) of justice after the evidence, such as it was, being presented to us.

It is understandable how a layman can be misled "by belaboring and repeating at great length the same inference for lack of proof", being human and therefore alwaus (sic) subject to human error. The erros (sic) is, in large measure my own and not only yours or the others who served and returned the verdict. More in error, I believe, (although there are some who might "cry sour grapes") are the prosecuting attorney, Mr. Oscar Howlett; the Portland City Police and my two attornies (sic) with whom I was forced to place my future. A certain degree of blame must rest on the trial judge and, as stated, I

muself (sic) must shoulder some of the burden. My error by large was trusting my attornies (sic), lack of knowledge of the law, court proceedings and not being in a position financally (sic) to arrange for adequate counsel to determine the truth. At this point, I am quite sure, I could have done better without these attornies (sic). The court ordered me to say nothing except through these gentlemen. This was his error, but I had to respect his orders. For the sake of didcussion (sic) it was my intention to put the defense case on and take the witness stand. My attornies (sic) informed me that they would walk out on me if they were not allowed to do it their way. What would you have done? I did what I thought was best at the time and under their pressures. You as a juror also did what you believed to be best under pressure that you no doubt have never experienced before and therefore had no yardstick by which you could measure the unusual task put before you. My error led you to yours, which has cost me long months in jail, my daughter, my mother, not to mention a great deal of respect for American jurisprudence.

For what it is worht; (sic) I feel great sorrow that you found yourself in the position to judge your fellow man and find it necessary to return the verdict you did. When I think how easy it was for the prosecution to manipulate the evidence in the eyes and minds of persons inexperienced with legal proceedings, I wonder if _merica (/) is safe in the hands of the people that control . . . people I fought for . . . and if my daughter will be safe under this system of law. I am sure now that the Ameri-

can system of justice is out of step and far behind the rest of the world. Only the wealthy are in any degree safe under it. It is a necessity, therefore, that our juries are allowed to think for themselves and weigh the facts —not the few that the prosecution presents in order to show just the degree of guilt necessary to convict, and omitting any that mihgt (sic) tend to show innocence.

It might be interesting for you to know that at the first trial, April 1958 the prosecuting attorney, Mr. Oscar Howlett tried me for killing Mr. Hollaway on 2nd and Jefferson St. Portland, knowing this was false. In fact, Mr. Howlett knows I am innocence (sic), that I never said any man was the father of my daughter but myself. That I have fought for her since she was born—fought every way I could. In fact I fought so hard in court, that her mother testified falsely to keep me from having her.

By your return verdict, together with the other jurors who served, she will be grown and I can never experience the joy of seeing her grow to a young lady. Her mother has boasted to the world that "Lee can't get her now, I'm proud he got life". This could have been brought to your attention had I wanted it. I was sure the people I chose for the jury would assume I was innocent until some proff (sic) of guilt was presented. I now see that I was in error.

The truth is not always pleasant to hear. A person that speaks the truth does not worry about the effect it has on others. I speak what I believe is the truth regardless, even though it is sometime difficult. It is hard to write

you and be honest without saying things you perhaps don't want to hear.

For what it is worth:

1. I, not Bob, am the father of my daughter.
2. I am not guilty of any part of this crime.
3. I don't know where Bob died, why, how or when.
4. My so called girl friend had to testify as she did or go to prison herself for other crimes.
5. The police know I am innocent, that I would have sued them had I not been convicted. The same goes for Mr. Howlett.
6. I work for a living. I never did hang out in the bars on third avenue in the constant manner you were led to believe.
7. Bob Holloway and I worked, lived and traveled over Washington, Oregon, Nevada, California, and Canada since I met him in 1948. We worked on more than one job in the mountians (sic) by ourselves and never had any trouble.
8. Mr. Cole, Mr. Young and many others had to testify as they did, or go to jail.

I leave it to you to find your own private verdict. I would appreciate hearing from you if it wouldn't further inconvenience you. It is legal and nothing but your conscience can dictate what you feel is right after due consideration.

Your truly,
/s/ Lee Parker

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SUPREME COURT OF THE UNITED STATES

No. 81.—October Term, 1966.

Lee E. A. Parker, Petitioner, *v.* Clarence T. Gladden, Warden of the Oregon State Penitentiary.	On Writ of Certiorari to the Supreme Court of the State of Oregon.

[December 12, 1966.]

Per Curiam.

Petitioner, after his conviction for second degree murder, 235 Ore. 366, 384 P. 2d 986, filed a petition for post-conviction relief, Ore. Rev. Stat. § 138.550. At a hearing on the petition the trial court found that a court bailiff assigned to shepherd the sequestered jury, which sat for eight days, stated to one of the jurors in the presence of others while the jury was out walking on a public sidewalk: "Oh, that wicked fellow [petitioner], he is guilty";[1] and on another occasion said to another juror under similar circumstances, "If there is anything wrong [in finding petitioner guilty] the Supreme Court will correct it."[2] Both statements were overheard by at least one regular juror or an alternate. The trial court found "that the unauthorized communication was prejudicial and that such conduct materially affected the rights of the [petitioner]." The Supreme Court of Oregon reversed, finding that "the bailiff's misconduct did not deprive [petitioner] of a constitutionally fair trial." — Ore. —, 407 P. 2d 246. We granted certiorari, 384 U. S. 904. The federal question decided by Oregon's highest

[1] The statement was made to alternate juror Mrs. Gattman and was overhead by juror Mrs. Inwards.

[2] The statement was made to an unidentified juror and overheard by juror Mrs. Drake.

court is, of course, subject to final determination in this Court and we have concluded that the judgment must be reversed.

We believe that the statements of the bailiff to the jurors are controlled by the command of the Sixth Amendment, made applicable to the States through the Due Process Clause of the Fourteenth Amendment. It guarantees that "the accused shall enjoy the right to a . . . trial, by an impartial jury . . . [and] be confronted with the witnesses against him. . . ." As we said in *Turner* v. *Louisiana*, 379 U. S. 466, 472–473 (1965), "the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is free judicial protection of the defendant's right of confrontation, of cross-examination and of counsel." Here there is neither dispute as to what the bailiff, an officer of the State, said nor that when he said it he was not subjected to confrontation, cross-examination or other safeguards guaranteed to the petitioner. Rather, his expressions were "private talk," tending to reach the jury by "outside influence." *Patterson* v. *Colorado*, 205 U. S. 454, 462 (1907). We have followed the "undeviating rule," *Shepherd* v. *Maxwell*, 384 U. S. 333, 351 (1966), that the right of confrontation and cross-examination are among the fundamental requirements of a constitutionally fair trial. *Kirby* v. *United States*, 174 U. S. 47, 55, 56 (1899); *In re Oliver*, 333 U. S. 257, 273 (1948); *Pointer* v. *Texas*, 380 U. S. 400 (1965).

The State suggests that no prejudice was shown and that no harm could have resulted because 10 members of the jury testified that they had not heard the bailiff's statements and that Oregon law permits a verdict of guilty by 10 affirmative votes. This overlooks the fact that the official character of the bailiff—as an officer of the court as well as the State—beyond question carries great weight with a jury which he had been shepherding

for eight days and nights. Moreover, the jurors deliberated for 26 hours, indicating a difference among them as to the guilt of petitioner. Finally, one [3] of the jurors testified that she *was* prejudiced by the statements which support the trial court's finding "that the unauthorized communication was prejudicial and that such conduct materially affected the rights of the defendant." This finding was not upset by Oregon's highest court. Aside from this, we believe that the unauthorized conduct of the bailiff "involves such a probability that prejudce will result that it is deemed lacking in due process," *Estes* v. *Texas,* 381 U. S. 532, 542–543 (1965). As we said in *Turner* v. *Louisiana, supra,* "it would be blinking reality not to recognize the extreme prejudice inherent" in such statements that reached at least three members of the jury and one alternate member. The State says that 10 of the jurors testified that they had not heard the statements of the bailiff. This, however, ignores the testimony that one of the statements was made to an unidentified juror, which, including Mrs. Inwards and Mrs. Drake, makes three. In any event, petitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors. See *State* v. *Murray,* 164 La. 883, 887.

Reversed.

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[3] Mrs. Inwards when recalled to the stand testified in response to a question by the court that "all in all it must have influenced me. I didn't realize it at the time."

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SUPREME COURT OF THE UNITED STATES

No. 81.—October Term, 1966.

Lee E. A. Parker, Petitioner, v. Clarence T. Gladden, Warden of the Oregon State Penitentiary.	On Writ of Certiorari to the Supreme Court of the State of Oregon.

[December 12, 1966.]

Mr. Justice Harlan, dissenting.

By not setting forth the background of this proceeding the Court has put seriously out of focus the constitutional issue involved in this case.

Parker was convicted of second degree murder on May 19, 1961, and sentenced to life imprisonment. On September 7, 1961, he addressed a letter to several jurors protesting his innocence, condemning his attorneys for incompetence, intimating that witnesses were coerced into lying, and chiding the jurors for being duped into finding him guilty. After affirmance of his conviction by the Supreme Court of Oregon on September 15, 1963—some two years after the jury verdict—Parker again set out to take his case to the jury. He furnished his wife with a tape recording in which he propounded a series of questions designed to uncover possible improprieties in the jury's deliberations. The jury had deliberated a long time and Parker had been told that their discussion was heated. Although unaware of any irregularities he commenced "shooting in the dark." (Tr., p. 16.) Mrs. Parker then acquired a jury list and discovered those jurors who had been most sympathetic to her husband.[1]

[1] The record shows that Mrs. Parker first called juror number one, Mrs. Inwards, and upon finding her sympathetic obtained from her the names of those who had held out longest. Mrs. Inwards also informed Mrs. Parker that an alternate juror, Mrs. Gattman, was sympathetic to Parker's cause.

She invited two regular jurors and an alternate to her home to listen to the recording and discuss the case. An attorney was then retained to prepare affidavits detailing the allegations before us and to institute this post-conviction proceeding. The statements before this Court were found to have been made by this apparently Elizabethan-tongued bailiff, but contrary to this Court's assertion the trial court found that these statements were only prejudicial in nature and not that they had a prejudicial effect.[2] The Oregon Supreme Court did not find the trial proceedings fundamentally unfair.

This Court finds the bailiff's remarks to be in violation of the Sixth Amendment's confrontation requirement. Although I believe that "a right of confrontation is 'implicit in the concept of ordered liberty,'" *Pointer* v. *Texas*, 380 U. S. 400, 408 (concurring opinion of HARLAN, J.), I cannot accede to the view that the Sixth Amendment is directly applicable to the States through the Fourteenth. As to the confrontation problem here asserted, I know of no case in which this Court has held that jurors must have been absolutely insulated from all

[2] The trial court purported to follow the State Supreme Court's decision in *State* v. *Kristich*, 226 Ore. 240, which held that where a bailiff had communicated with a jury on a point of law prejudice would be presumed. Thus the trial court said that "if the matters alleged in plaintiff's petition had been called to the Court's attention, the Court, on its own motion, would have granted the defendant a new trial," and held that Parker deserved a new trial because the communication was of a prejudicial nature. The Oregon Supreme Court reversed because it held that the trial court erroneously applied the new trial standard to a post-conviction proceeding where only error of constitutional magnitude would serve to overthrow the verdict. The Supreme Court made no specific finding on prejudice but in distinguishing *Turner* v. *Louisiana*, 379 U. S. 466, noted a "difference in degree of the out-of-courtroom influence . . . so great as to lead us to the conclusion that the bailiff's misconduct did not deprive defendant of a constitutionally correct trial."

expressions of opinion on the merits of the case or the judicial process at the risk of declaration of a new trial. *Irvin* v. *Dowd*, 366 U. S. 717. Even where this Court has acted in its supervisory capacity it has refused to hold that jury contact with outside information is always a cause for overthrowing a verdict, wisely preferring to allow "each case . . . . [to] turn on its special facts." *Marshall* v. *United States*, 360 U. S. 310, 312. The Court notes that these remarks were made by a state officer, but does not explain why the bailiff's official capacity would in this instance make him any more a "witness" than any other person able to communicate with the jury. Thus, though I believe unintentionally, the Court's opinion leaves open the possibility of automatically requiring a mistrial on constitutional grounds whenever any juror is exposed to any potentially prejudicial expression of opinion.

Considering this case, as I would, under the doctrine of fundamental fairness implicit in the Due Process Clause of the Fourteenth Amendment, I think a different result follows. Much reliance has been placed upon *Turner* v. *Louisiana*, 379 U. S. 466. But in *Turner* we faced a situation in which the trial court allowed two deputy sheriffs who were key witnesses to be placed in "continuous and intimate association" with the jury, and it would have been "blinking reality not to recognize the extreme prejudice inherent in this situation." 379 U. S., at 473. There too we faced "a procedure employed by the State" involving "such a probability that prejudice will result" that we deemed it "inherently lacking in due process." *Estes* v. *Texas*, 381 U. S. 532, 542–543. Here no procedure adopted by the State is to be faulted and it seems clear to me that the rule of *Stroble* v. *California*, 343 U. S. 181, and *Irvin* v. *Dowd*, *supra*, should apply and a substantial showing of prejudice in fact must be made before a due process violation can be found.

On this basis the occurrences before us seem inconsequential to me in light of the eight-day trial and twenty-six hour jury deliberation. And my feeling is confirmed by the extremely trivial evidence of prejudice amounting to no more than an assertion by one obviously highly emotional and "guilt"-ridden juror that she might have been influenced without realizing it.[3] "[I]t is an impossible standard to require that tribunal [the jury] to be a laboratory, completely sterilized and freed from any external factors." *Rideau* v. *Louisiana*, 373 U. S. 723, 733 (CLARK, J., dissenting).

The potentialities of today's decision may go far beyond what, I am sure, the Court intends. Certainly the Court does not wish to encourage convicted felons to "intimidate, beset and harass," *Stein* v. *New York*, 346 U. S. 156, 178, a discharged jury in an effort to establish possible grounds for a new trial. Our courts have always been alert to protect the sanctity of the jury process. *McDonald* v. *Pless*, 238 U. S. 264; see *Castaldi* v. *United States*, 251 F. Supp. 681. But in allowing Parker to overturn his conviction on the basis of what are no more than inconsequential incidents in an otherwise constitutionally flawless proceeding, the Court encourages others to follow his example in pursuing the jury and may be thought by some to commit federal courts in habeas to interrogate the jury upon the mere allegation that a

[3] Mrs. Inwards, who on recall testified that she must have been unconsciously influenced, denied any influence when first examined. In her further testimony she admitted that she was extremely upset by the verdict and would do anything short of committing perjury to overturn it. She stated, however, that although she had gone to the trial judge to discuss the verdict she had never mentioned the bailiff's remarks to him. In specifying that the bailiff's remarks "must" have influenced her she limited herself to declaring that they did so in connection with the pressure put on her by other jurors during the deliberations thus stating that "all in all" she "must" have been influenced.

prejudicial remark has reached the ears of one of its members. *Remmer* v. *United States*, 347 U. S. 227. To any such result I cannot subscribe.

I think the Oregon Supreme Court correctly assessed the constitutional issue before us, and I would affirm its judgment.